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DEVELOPMENTAL INCOMPETENCE, DUE PROCESS, AND JUVENILE JUSTICE POLICY

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INTRODUCTION

In 2003, the Florida District Court of Appeal reversed the murder conviction and life sentence imposed on Lionel Tate, who was twelve years old when he killed his six-year-old neighbor.[1] Since Lionel was reported to be the youngest person in modern times to be sent to prison for life, the case had generated considerable debate, and the decision was appealed on several grounds. What persuaded the appellate court that the conviction could not stand, however, was the trial court's rejection of a petition by Lionel's attorney for an evaluation of his client's competence to assist counsel and to make a decision about the state's plea offer.[2]

This case highlights an issue that has hovered almost unnoticed in the background of the recent punitive juvenile justice reforms that have resulted in criminal prosecutions of young teens and adult-like sentences in juvenile court. This legal trend has been the subject of intense political and academic debates, focusing on whether the reforms fulfill the criminal law goals of public protection, individual

1. Lionel was tried after declining the state's offer of a plea agreement that included a three-year sentence. Although his attorney supported accepting the plea, Lionel's mother was opposed. *See* Michael Browning et al., *Boy, 14, Gets Life in TV Wrestling Death: Killing of 6-Yr.-Old Playmate Wasn't Just Horseplay, Florida Judge Says*, CHI. SUN-TIMES, Mar. 10, 2001, at 1. For a description by Lionel's attorney of his client's comprehension of the proceedings, see *infra* note 10.

2. Tate v. State, 864 So. 2d 44, 47 (Fla. Dist. Ct. App. 2003); *see also* Abby Goodnough, *Youngster Given Life Term for Killing Gets New Trial*, N.Y. TIMES, Dec. 11, 2003, at A28; Curtis Krueger, *Young Killer Gets Second Chance*, ST. PETERSBURG TIMES, Dec. 11, 2003, at 1A; Manuel Roig-Franzia, *Killer of 6-Year-Old to Get a New Trial*, WASH. POST, Dec. 11, 2003, at A3.

accountability, and proportionate punishment—and generally, whether imposing harsh punishment on young offenders ultimately serves the public interest.[3] By comparison, whether youths who face serious legal jeopardy have the developmental capacities to function adequately as criminal defendants has received little attention.

And yet, even a cursory examination of constitutional doctrine in this area and its application to the recent reforms make clear that this issue cannot be ignored. It is well established in American law that a defendant cannot be subject to criminal adjudication if he is incompetent to stand trial because he is unable to understand the charges against him or the nature of the proceedings, or to assist his attorney in his defense.[4] The Supreme Court has emphasized that these requirements are essential for fundamental fairness and are mandated by the Due Process Clause because they protect the accuracy and integrity of criminal proceedings.[5] The conventional standard by which competence is evaluated focuses on adults'

3. For critiques of recent reforms see generally Elizabeth Scott & Larry Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003). *See generally* THOMAS GRISSO & ROBERT G. SCHWARTZ, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (2000) (an analysisof juvenile justice from the perspective of developmental psychologists) [hereinafter YOUTH ON TRIAL]; Elizabeth Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997) (advocating a continued juvenile justice system separate from the adjudication of adults, based on lessons from developmental psychology). For a defense of the reforms, see generally Ralph Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907 (1995) (supporting efforts to reform the juvenile justice system and advocating for an enhancement of such efforts); Christine Chamberlin, Note, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 B.C. L. REV. 391 (2001) (supporting a juvenile justice system with blended adult and juvenile sentencing and automatic transfer of juveniles to adult court in certain cases).

4. This test was announced by the Supreme Court in *Dusky v. United States*, 362 U.S. 402 (1960). *See infra* note 21 and accompanying text. *See generally* Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375 (1985) (addressing some of the major issues with the ABA mental health competence standards); Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation To Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419 (1990) (critiquing the system of determining the competence of defendants with mental retardation); Bruce Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921 (1985) (proposing restructuring the process for determining adjudicative competence).

5. *See generally* Cooper v. Oklahoma, 517 U.S. 348 (1996) (rejecting Oklahoma's requirement that incompetence be proven under a "clear and convincing evidence" standard); Drope v. Missouri, 420 U.S. 162 (1975) (finding that the lower court failed to give proper weight to information suggesting the defendant was incompetent); Pate v. Robinson, 383 U.S. 375 (1966) (holding that a district court's failure to inquire into an inmate's competence to stand trial deprived the inmate of his constitutional right to a fair trial).

cognitive deficiencies caused by mental illness or mental retardation.[6] Beginning in the 1970s, courts and legislatures have extended this protection to mentally impaired youths adjudicated in juvenile proceedings.[7] However, few lawmakers have addressed the impact of developmental immaturity on competence.[8]

Under contemporary juvenile justice regulation, however, this issue has become highly salient. Adjudicative competence is a functional requirement. The constitutional mandate is satisfied if a defendant has certain capacities that allow her to participate adequately in the proceedings against her; if she lacks those capacities, the prosecution cannot go forward.[9] Whether the source of a defendant's incompetence is mental illness or immaturity is not (or should not be) relevant. Thus, policymakers and courts face a constitutional imperative to incorporate developmental competence into the procedural architecture of juvenile justice policy.

This challenge, on first inspection, may seem to be a modest one. On one level, developmental immaturity is simply an additional basis (along with mental illness or mental retardation) for invoking a standard procedural protection available to criminal defendants. Legislatures and courts can establish procedures by which attorneys who find their clients too uncomprehending or confused due to immaturity[10] can petition for an evaluation and judicial competence determination. Viewed in this light, developmental incompetence represents a modest doctrinal expansion, which carries some urgency because of the recent punitive reforms.

6. *See Pate*, 383 U.S. at 376–77; *Dusky*, 362 U.S. at 403.

7. *See* Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 400–01 (2001) (listing statutes and case law that require competence hearings for juveniles). In *In re Gault*, 387 U.S. 1 (1967) the Supreme Court held that fundamental fairness required that certain procedural protections be extended to youth during the adjudication stage of a delinquency proceeding, including the right to counsel, the privilege against self-incrimination, and the right to confront and cross examine witnesses. *Id.* at 10. After *Gault*, the Supreme Court and state courts considered whether other protections should be extended to juveniles. *See infra* notes 26–27 and accompanying text. Although the Supreme Court has never decided whether the competence requirement must be applied in juvenile court, many state courts have addressed this issue. For a discussion of juvenile competence to stand trial cases, see *infra* notes 25–37 and accompanying text.

8. As we discuss in Part I, this is likely because, traditionally, few youths faced adult jeopardy, and juvenile proceedings were assumed to be tailored to youths.

9. *See* cases cited *supra* note 5.

10. Lionel Tate's actions during his trial for murder exemplify this immaturity. As his lawyer noted, Tate was "sitting here playing with pencil, pen and drawing pictures in what's probably the most important proceeding of his life." Tate v. State, 864 So. 2d 44, 48 (Fla. Dist. Ct. App. 2003).

The issue is more complex, however. Although immaturity and mental illness or disability may all produce cognitive and behavioral deficits that impede trial competence, several distinctive features of developmental incompetence create major challenges for policymakers devising juvenile crime policy. Relatively few adult defendants are found to be incompetent to stand trial, and procedures for restoration to competence are straightforward and usually effective. In contrast, powerful research evidence indicates that many younger adolescents may lack the capacities needed to participate as defendants in a criminal proceeding. An important study sponsored by the MacArthur Foundation recently found a high risk of trial incompetence among younger teens and even mid-adolescents using the measures applied to adults.[11] This research confirms earlier studies of youths' capacities in legal settings as well as general developmental psychology evidence about maturation.[12] It shows that the risk of developmental incompetence is correlated predictably with age and concentrated in a readily identified group—younger teens. In that group, the incidence of developmental incompetence is likely to be high. Moreover, the conventional remedy for incompetent defendants, the restoration of competence, may often have little meaning as applied to youths who have never been competent, and for whom maturation is the only effective remedy.

Because of these distinctive features, developmental incompetence poses institutional challenges beyond those raised by the conventional forms. Even under the most parsimonious account of the impact of recognizing this construct, the evaluation and determination of trial competence will play a prominent role in most criminal prosecutions of younger and mid-adolescents. Beyond this, lawmakers must also confront the challenge of creating dispositional remedies that respond to this unique form of incompetence. In contrast to adults, many immature youths cannot attain competence through medical or instructional interventions. We will argue that an efficient disposition for most youths deemed incompetent to proceed

11. *See generally* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) (summarizing the MacArthur Study). In the MacArthur study, which included 1393 subjects from ages eleven to twenty-four, almost one-third of youths aged eleven to thirteen years and nineteen percent of fourteen- and fifteen-year-olds performed as poorly on adjudicative competence measures as adults who are found to be incompetent to stand trial, whereas sixteen- and seventeen-year-olds performed much like adults. *See* discussion *infra* Part II.C. The study did not measure or reach conclusions about trial incompetence per se, as that is a legal judgment.

12. This research is described *infra* Part II.

in criminal court is adjudication in a juvenile delinquency proceeding. This implies, of course, that the competence requirements in delinquency proceedings must be less demanding than those applied to criminal trials.[13] A less demanding juvenile court standard avoids an institutional crisis that would arise if a unitary standard were applied to juvenile and criminal proceedings; under such a regime, a sizeable group of younger teens might be immune from prosecution in *any* court, whereas under the dual standard regime that we propose, most youths could be adjudicated and subject to juvenile dispositions. Our analysis demonstrates that dual competence standards are compatible with fundamental fairness as required by the Due Process Clause.[14]

An important caveat is in order here. The adoption of a less demanding competence standard can be constitutionally justified only if the punishment stakes in delinquency proceedings are lower than those facing criminal defendants and the objectives of juvenile justice policy are broader than punishment. These constraints challenge the recent reforms creating more punitive juvenile court dispositions, at least as applied to those teens who are incompetent under adult standards.[15]

A road map of the Article may be useful. Part I describes the legal and constitutional landscape of the trial competence requirement and how it has been applied to juveniles. We explain how the issue of developmental competence emerged only in the context of the recent punitive reforms in juvenile justice policy and why this construct must be incorporated into legal doctrine. Part II examines the scientific evidence regarding the link between immaturity and incompetence. We describe the developmental psychology knowledge about adolescent capacities that are related to trial performance, as well as research evidence on adjudicative competence among juveniles. Part III examines the implications of this research for legal policy, exploring both the threshold importance of adjudicative competence for assuring fundamental fairness in criminal and delinquency proceedings as well as the implications for

13. Otherwise youths who are incompetent to stand trial as adults also could not participate in delinquency proceedings.

14. *See* discussion *infra* Part III.B.

15. For example, in many jurisdictions today, juvenile court sentences extend into adulthood, and juvenile court convictions are used in adult sentencing determinations. *See* Richard E. Redding & James C. Howell, ***Blended Sentencing in American Juvenile Courts***, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 145 (Jeffrey Fagan & Franklin E. Zimring eds., 2000). For a discussion of these challenges and possible solutions, see *infra* Part III.D.

institutional reform.

I. APPLYING THE TRIAL COMPETENCE REQUIREMENT TO JUVENILES: A DOCTRINAL HISTORY

In this Part, we briefly describe the legal and constitutional mandate that defendants must be competent to stand trial and then turn to its application to juvenile defendants. The latter account has unfolded against the backdrop of evolving juvenile justice policy over several decades. The issue of adjudicative competence simply was not deemed relevant in traditional juvenile delinquency proceedings. Competence doctrine was introduced into this setting beginning in the 1970s, after the Supreme Court announced in *In re Gault*[16] that juvenile defendants were entitled to many of the procedural protections provided to adults in criminal trials.[17] During the post-*Gault* period, the competence inquiry focused on the incapacities of mentally ill or retarded youths. However, beginning in the late 1980s, dramatic reforms in juvenile justice policy have resulted in the institutional challenge the justice system faces today—that of meeting the constitutional mandate in an era when many young defendants facing serious legal jeopardy may be incompetent due to immaturity.

A. *The Legal and Constitutional Requirements of Competence To Stand Trial*

The procedural requirement that criminal defendants must be competent to stand trial has long been established as a mechanism to assure that minimum standards of fairness are met in criminal proceedings.[18] The requirement originally served a rather formalistic function. A criminal trial could proceed only after the defendant entered a plea; thus, adjudication was barred if a defendant's disability prevented him from entering a plea, but not if he was "mute of malice."[19] The doctrine evolved to focus on defendants' capacities to understand the proceedings and the charges against them, and to assist counsel in offering a defense; those whose mental disabilities precluded effective participation could not be tried. This contemporary understanding is captured in the federal standard announced by the Supreme Court in *Dusky v. United States*,[20] which

16. 387 U.S. 1 (1967).

17. *Id.* at 10.

18. Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, *in* YOUTH ON TRIAL, *supra* note 3, at 73, 74.

19. *Id.* at 74.

20. 362 U.S. 402 (1960).

has since been adopted uniformly by American courts. Under *Dusky*, the competence determination focuses on "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[21]

It is generally agreed that the requirement of trial competence serves three independent functions. First, it preserves the integrity of criminal trials, which would be undermined if a mentally impaired and uncomprehending defendant faced the power of the accusing state in a proceeding in which his liberty is at stake. Second, the requirement reduces error and promotes the accuracy of the proceedings. Again because of the high stakes, error in criminal proceedings that could result in a wrongful conviction undermines basic fairness. An incompetent defendant may be unable to challenge prosecution evidence or to offer exculpatory information. She may also be disabled from raising defenses that an individual with better comprehension could assert. Finally, the competence requirement safeguards defendants' autonomy-based interest in meaningful participation in criminal proceedings—and thus protects a core value underlying due process in this setting.[22] In *Pate v. Robinson*,[23] the Supreme Court affirmed the constitutional importance of this requirement, holding that the Due Process Clause requires that criminal defendants must be competent to stand trial.[24]

B. *Trial Competence of Juveniles*

1. The Incorporation of the Competence Requirement in Delinquency Proceedings

The requirement that criminal defendants be competent to stand trail had no place in delinquency proceedings in the traditional juvenile court. In a system in which the government's announced purpose was to rehabilitate and not to punish errant youths, the procedural protections accorded adult defendants—including the

21. *Id.* at 402.

22. Bruce J. Winick, *Restructuring Competency To Stand Trial*, 32 UCLA L. REV. 921, 950 (1985) ("[T]he incompetency doctrine ... has been characterized by the Supreme Court as 'fundamental to an adversary system of justice.' As a result, the doctrine is widely regarded as being compelled by due process considerations." (quoting Drope v. Missouri, 420 U.S. 162, 172 (1975))); *see also* Bonnie & Grisso, *supra* note 18, at 76.

23. 383 U.S. 375 (1966).

24. *Id.* at 378.

requirement of adjudicative competence—were deemed unnecessary.[25] This all changed with *In re Gault*, which led to an extensive restructuring of delinquency proceedings to conform to the requirements of constitutional due process.[26] Although the Supreme Court has never considered whether due process requires that defendants in juvenile delinquency proceedings be competent to stand trial, many state courts have addressed this issue. Almost all have held that the requirements of due process and fair treatment can be satisfied in juvenile delinquency proceedings only if defendants are competent to stand trial.[27]

Courts addressing this issue generally have not offered extensive analysis of why the requirement of trial competence should apply to delinquency proceedings. As a general matter, courts note the quasi-criminal nature of these proceedings and the potential loss of liberty that can result from adjudication. Some courts have found the requirement of adjudicative competence to be important because other procedural rights accorded to juvenile defendants would have little value if the defendant were incompetent.[28] Most important, perhaps, the value of the right to counsel is thought to be greatly

25. Judge Ben Lindsey of the Denver Juvenile Court was an outspoken early advocate of informal delinquency proceedings. *See* BEN B. LINDSEY & HARVEY J. O'HIGGINS, THE BEAST 133 (University of Washington Press 1970) (1910) (arguing that the privilege against self incrimination has no place in a juvenile delinquency proceeding because young offenders should confess their wrongdoing).

26. *Gault* extended several procedural rights to juveniles in the adjudication stage of delinquency proceedings—the right to counsel, the privilege against self-incrimination, the right of confrontation and the right to notice of the charges. *See Gault*, 387 U.S. at 33, 41, 55–56. In *In re Winship*, 397 U.S. 358 (1970), the Court held that proof beyond a reasonable doubt is required in delinquency proceedings. *Id.* at 368; *see also* Breed v. Jones, 421 U.S. 519, 528 (1975) (holding that juveniles were protected against double jeopardy). Nonetheless, the Court has made clear that not all constitutional protections accorded to criminal defendants are required in juvenile delinquency proceedings. *See infra* note 33.

27. *See Ex parte* Brown, 540 So. 2d 740, 744–45 (Ala. 1989); State *ex rel.* Dandoy v. Superior Court, 619 P.2d 12, 15 (Ariz. 1980); Golden v. State, 21 S.W.3d 801, 802-803 (Ark. 2000); James v. Superior Court, 143 Cal. Rptr. 398, 400–401 (Cal. Ct. App. 1978); *In re* W.A.F., 573 A.2d 1264, 1265–66 (D.C. 1990); *In re* S.H., 469 S.E.2d 810, 811–12 (Ga. Ct. App. 1996); *In re* T.D.W., 441 N.E.2d 155, 157 (Ill. App. Ct. 1982); *In re* K.G., 808 N.E.2d 631, 635 (Ind. 2004); State v. Kempf, 282 N.W.2d 704, 706–707 (Iowa 1979); State *ex rel.* Causey, 363 So. 2d 472, 475–76 (La. 1978); *In re* Carey 615 N.W.2d 742, 747 (Mich. Ct. App. 2000); *In re* S.W.T.' s Welfare, 277 N.W.2d 507, 511 (Minn. 1979); Matter of Two Minor Children, 592 P.2d 166, 170 (Nev. 1979); *In re* Williams, 687 N.E.2d 507, 510–11 (Ohio Ct. App. 1997); *In re* J.M., 769 A.2d 656, 662 (Vt. 2001); State v. E.C., 922 P.2d 152, 154 (Wash. Ct. App. 1996). An exception is the Oklahoma Court of Criminal Appeals, which found that adjudicative competence is not constitutionally required. G.J.I. v. State, 778 P.2d 485, 487 (Okla. Crim. App. 1989).

28. *See, e.g.*, *In re* S.H., 469 S.E.2d at 811.

diminished if the youth cannot communicate with her attorney or is unaware of the nature of the proceedings due to mental illness or disability.[29] Other courts emphasize that the value of accuracy, which is promoted by requiring that defendants be capable of assisting counsel, is compatible with the purposes of juvenile delinquency proceedings.[30]

Courts incorporating the adjudicative competence requirement into delinquency proceedings have assumed that the incapacities of incompetent juveniles are analogous to those of their adult counterparts: the cases have almost exclusively involved youths who are mentally ill or mentally retarded.[31] Although a few courts have suggested in passing that immaturity might exaggerate the challenges faced by incompetent youths,[32] developmental incompetence per se has received little attention in the case law.

On reflection, this is not surprising. The project undertaken by post-*Gault* courts was to examine discrete legal protections enjoyed by criminal defendants to determine whether they should be incorporated into delinquency proceedings.[33] Since adjudicative competence doctrine almost exclusively focused on mental illness and disability as sources of incompetence,[34] courts extending this protection to juveniles were seldom confronted with the issue of

29. *See Golden*, 21 S.W.3d at 803; *In re K.G.*, 808 N.E.2d at 635; *In re Carey*, 615 N.W.2d at 746.

30. *See In re W.A.F.*, 573 A.2d at 1267.

31. *See supra* note 27 and accompanying text. All of these cases involved mentally ill or disabled youths, although a few were also very young. *See Golden*, 21 S.W.3d at 801 (involving an eleven-year-old defendant); *In re K.G.*, 808 N.E.2d at 632 (involving a ten-year-old, an eleven-year-old, and a twelve-year-old defendant); W.S.L. v. State, 470 So. 2d 828, 828 (Fla. Dist. Ct. App. 1985) (involving a nine-year-old defendant); *In re S.H.*, 469 S.E.2d at 810 (involving a twelve-year-old defendant).

32. *See In re Carey*, 615 N.W.2d at 748; *Causey*, 363 So. 2d at 476. Even in these cases, however, the petitioners claimed incompetence on the basis of disability and not immaturity.

33. *See supra* note 25. Sometimes the Court concluded that procedural rights accorded adults should not be extended to juvenile delinquency proceedings. *See generally* Schall v. Martin, 467 U.S. 253 (1984) (involving right to bail); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (involving right to a trial by jury).

34. Some cases have focused on physical conditions that could impair competence. The Supreme Court of Louisiana discussed seven factors to consider when determining whether a physical condition impairs competence. State v. Karno, 342 So. 2d 219, 222–23 (La. 1977); *see also* State v. Richardson, 330 N.C. 174, 179–80, 410 S.E.2d 61, 64 (1991) (addressing defendant's claim that his absence from trial was the result of back problems); State v. Ortiz, 571 P.2d 1060, 1062 (Ariz. Ct. App. 1977) (including physical ailments in defendant's claim of incompetence); Compton v. State, 500 S.W.2d 131, 133 (Tex. Crim. App. 1973) (analyzing defendant's physical ailments in making competence determination).

incompetence solely based on immaturity. More importantly, the underlying rationale for maintaining a separate system for the adjudication and correction of juveniles is that young offenders, *because* of their immaturity, warranted differential treatment. Thus, the idea that immaturity should be a basis for disqualification from adjudication in juvenile court understandably might have seemed incoherent, or at least incompatible with the rationale for the system. The post-*Gault* legal developments took place in a context in which courts, even as they incorporated adult rights, continued to assume that the juvenile court was very different from the criminal justice system in its purposes and in the severity of its sanctions. Courts considering due process claims emphasized these differences, at least rhetorically, and evaluated procedural protections in part on the basis of their compatibility with the unique purposes and character of the juvenile court.[35] Thus, it is understandable that delinquency jurisdiction was assumed to extend to youths charged with crimes, without regard to their immaturity.

In concluding that trial competence is required in delinquency proceedings, courts divided on the competence standard to be applied. Some courts assumed that the *Dusky* standard should simply be incorporated into delinquency proceedings, while others were less clear about the standard to be applied, emphasizing that juveniles should be assessed by "juvenile rather than adult norms."[36] Although

35. *See* Breed v. Jones, 421 U.S. 519, 536–37 (1975); *McKeiver*, 403 U.S. at 665. For example, Justice White has written that:

> To the extent that the jury is a buffer to the corrupt or overzealous prosecutor in the criminal law system, the distinctive intake policies and procedures of the juvenile court system to a great extent obviate this important function of the jury. As for the necessity to guard against judicial bias, a system eschewing blameworthiness and punishment for evil choice is itself an operative force against prejudice and short-tempered justice. Nor where juveniles are involved is there the same opportunity for corruption to the juvenile's detriment or the same temptation to use the courts for political ends.

McKeiver, 403 U.S. at 665 (White, J., concurring). This assumption is clear in opinions dealing with competence to stand trial as well. For example, one court has noted that:

> We disagree with our colleagues, however, on the applicability of the adult competency statute. The juvenile court system is founded on the notion of *parens patriae*, which allows the court the power to step into the shoes of the parents. . . . Adopted by American common law, the *parens patriae* doctrine gives juvenile courts power to further the best interests of the child, which implies a broad discretion unknown in the adult criminal court system.

In re K.G., 808 N.E.2d at 635–36.

36. State v. Settles, No. 13-97-50, 1998 Ohio App. LEXIS 4973, at *9 (Ohio Ct. App. Sept. 30, 1998).

little elaboration of the meaning of "juvenile norms" was offered, these courts stressed that youths in juvenile delinquency proceedings cannot be expected to have the same level of comprehension as adults, and that a lower standard of competence applies to these proceedings.[37] This approach amounts to an implicit recognition that the distinctive purposes of the juvenile court may warrant less exacting procedural requirements.

2. The Criminal Adjudication of Youths

Both before and after *Gault*, youths were occasionally transferred to criminal court and tried and punished as adults. Even in this context, the doctrine prohibiting the adjudication of incompetent defendants has not been adapted in most states to exclude immature youths from criminal prosecution. Under a few statutes, courts conducting transfer hearings are expressly directed to consider whether the youth's immaturity would render her unable to participate in a criminal proceeding.[38] More indirectly, courts evaluating amenability to treatment in the juvenile system, a factor in the transfer decision under most statutes, likely consider generally the developmental immaturity of the youth, although not focusing explicitly on trial competence. In this way, courts almost inadvertently might exclude immature youths from criminal adjudication, but with no explicit evaluation of trial competence.

Similarly, little evidence suggests that criminal courts ordered competence evaluations on the basis of immaturity after transfer.[39] In part, this may not be surprising when it is remembered that, until the 1990s, immature youths generally were not subject to adult criminal proceedings because younger adolescents could not be transferred under most statutes. Thus, the occasional sixteen- or seventeen-year-old criminal defendants may not have raised concerns about trial competence, because they were mature enough to participate adequately in the proceedings.

37. The Michigan Court of Appeals reversed the decision of a trial court that competence was not relevant in a delinquency proceeding in a case involving a youth whose IQ was assessed at 52. People v. Carey, 615 N.W.2d 742, 748 (Mich. Ct. App. 2000). The court stated that "[a] juvenile need not be found incompetent just because, under adult standards, the juvenile would be found incompetent in a criminal proceeding." *Id.*

38. *See* VA. CODE ANN. § 16.1-269.1(3) (Michie 2003).

39. A rare appellate opinion dealing with a competence evaluation based on immaturity involved a nine-year-old defendant convicted of first degree murder. W.S.L. v. Florida, 470 So. 2d 828, 829 (Fla. Dist. Ct. App. 1985). The appellate court directed a competence evaluation because the defendant may have been incompetent due to his "age and intellect." *Id.* at 830.

In sum, until the 1990s, the issue of the trial competence of juveniles involved a straightforward doctrinal exercise of incorporating a procedural protection that is relevant to a relatively small number of impaired adult defendants into delinquency proceedings, where it was assumed also to protect a small number of mentally ill or disabled youths. Thus, the adjudicative competence requirement had a modest institutional impact on delinquency proceedings. The issue of developmental incompetence simply did not become salient during this period either in juvenile court, which was established to deal with a population of immature lawbreakers, or in criminal court, because those youths who were tried as adults tended to be older adolescents.[40] Although the introduction of this procedural requirement created some challenges for the juvenile system, which often lacked the statutory procedures and institutional mechanisms for dealing with youths found to be incompetent,[41] these challenges were generally modest.

C. *The Punitive Juvenile Justice Reforms*

The punitive reforms of juvenile justice policy that began in the late 1980s destabilized this equilibrium by increasing the punishment stakes facing many young offenders and eroding the boundary between the adult and juvenile systems. We will show how these legal developments unwittingly have transformed adjudicative

40. In 1985, six percent of juveniles waived to a criminal court were under sixteen years old. JEFFREY A. BUTTS, U.S. DEP'T OF JUSTICE, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 1985–1994 1 (1997). By 1999, fourteen percent of a larger cohort of juveniles waived were under sixteen years old. CHARLES M. PUZZANCHERA, U.S. DEP'T OF JUSTICE, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 1990–1999 2 (2003).

41. In a Georgia case, the lower court had found the defendant incompetent but continued the trial because "Georgia law does not provide a statutory framework in order to protect juveniles [sic] rights not to be tried in a delinquency proceeding while they are incompetent." *In re* S.H., 469 S.E.2d 810, 810 (Ga. Ct. App. 1996). Most courts have held that adult procedures are to be applied in the juvenile courts. *See, e.g.*, *In re* W.A.F., 573 A.2d 1264, 1267 (D.C. 1990) ("[W]e hold that the determination of mental competency of a juvenile is one of those instances where the procedure followed in adult criminal prosecutions must be applied to juvenile delinquency proceedings."). However, upholding the requirement of competence to stand trial in delinquency proceedings the Supreme Court of Indiana concluded that the adult dispositional procedures under the statute did not apply to juveniles. *See In re* K.G., 808 N.E.2d 631, 639 (Ind. 2004). The court noted a lack of appropriate space available for juveniles:

> In addition to the lack of adequate facilities or programs, because of the physical location of these state run facilities, a juvenile committed to the division of mental health under the auspices of the adult competency statute could be confined in an institution hundreds of miles from home and family.

Id. at 638.

competence from a minor procedural reform in delinquency proceedings into a major institutional challenge and introduced developmental incompetence as a construct that demands attention.

The history of the recent reforms is familiar. Responding to an increase in the rate of violent juvenile crime in the late 1980s and early 1990s,[42] advocates for tougher policies argued that young criminals represented a serious threat to public safety that could only be contained if they were punished as adults.[43] Disenchantment with the juvenile court also played a role, with critics claiming that excessive leniency toward young offenders contributed to the youth crime problem.[44] To be sure, the reforms generated controversy. Some observers argued that adult punishment was likely to diminish the prospects for productive adulthood in youths who might

42. The juvenile crime rate peaked in 1993; it declined during the second half of the 1990s. *See* Scott & Steinberg, *supra* note 3 at 807–08. In 2000, "the serious violent crime offending rate was 17 crimes per 1,000 juveniles ages 12 to 17 . . . a 67 percent drop from the 1993 high and the lowest recorded since the national victimization survey began in 1973." FED. INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 2003 45. However, punitive reforms have continued apace, despite the decline in juvenile crime since the mid-1990s. In 2000, California voters approved Proposition 21, or the Gang Violence and Juvenile Crime Prevention Act, which "made fifteen changes to the Penal Code which focus on gang-related crimes committed by adults" and "seventeen substantial changes to the Welfare and Institutions Code, all of which focus on the violent quality of crime perpetrated by juveniles and impose harsher punishment." Sara Raymond, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California's Juvenile Justice System and Reasons To Repeal It*, 30 GOLDEN GATE U. L. REV. 233, 234 (2000). One notable provision amended a California statute so that anyone who is at least fourteen years old and commits murder or sexual assault is transferred to criminal court. *Id.* at 255 (citing CAL. WELF. & INST. CODE § 602 (West 2003 & Supp. 2004)). Previously the statute required the juvenile be sixteen and have previously been found a ward of the court. *Id.* at 256.

43. Advocates for tougher policies argue that:

> Urban criminals who end up in prison typically start out young and commit dozens of crimes before they get their first ticket to the big house. Restraining these chronic youth offenders early in their careers rather than waiting until they have found their umpteenth victims is not only a boost to public safety, but a blow for morality and justice.

John J. DiIulio et al., *How To Deal with the Youth Crime Wave*, WKLY. STANDARD, Sept. 16, 1996, at 30.

44. As one critic put it,

> The juvenile courts fail to teach juveniles that they will be held responsible for their criminal acts; that the more serious and frequent their acts, the more responsible they will be held; and that the older they are, the more responsible they will be expected to be. As a consequence, serious juvenile crime is soaring while the public's confidence in juvenile justice is plummeting.

Rossum, *supra* note 3, at 925–26.

otherwise outgrow their criminal tendencies; others challenged the reforms as illegitimate on proportionality grounds, for holding youths to adult standards of criminal responsibility.[45] The overriding political sentiment, however, was captured in the slogan, "Adult time for adult crime."[46]

The reforms are embodied in several legislative strategies under which juveniles facing criminal charges increasingly have been treated like their adult counterparts. First, the age at which a juvenile can be subject to criminal proceedings has been lowered in most states, such that in many jurisdictions, pre-teens can be tried as adults and sentenced to prison.[47] Moreover, the range of felonies that can result in adult prosecution has been substantially broadened to include not only serious violent crimes, but also less serious felonies, particularly drug crimes.[48] Under legislative waiver statutes, criminal court jurisdiction is triggered automatically, based solely on the youth's age and the offense, with no individualized evaluation of amenability to treatment or immaturity.[49] Finally, in some states, prosecutors have substantial discretion to decide without judicial approval whether youths will be adjudicated in juvenile or criminal court.[50]

45. For a discussion of critiques, see *supra* note 3; *see generally* Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 L. & HUM. BEHAV. 229 (1996) (arguing for legal consequences for adolescents that differ from punishment given to adults).

46. The origin of this frequently quoted statement is uncertain. *See* Barbara Bennett Woodhouse, *Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood*, 51 DEPAUL L. REV. 743, 744 (2002) (quoting, but not endorsing, the slogan).

47. In many states, the age of criminal prosecution for homicide is twelve or even younger. For other felonies, the minimum age may be a year or two older. Today, the mode minimum age of adult prosecution is probably age thirteen or fourteen, whereas a generation ago it was age fifteen or sixteen. For a recent summary of state laws, see MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILES IN COURT 6–10 (2003).

48. For example, Wisconsin allows the prosecutor to request a transfer when the juvenile is at least fourteen and is accused of felony murder, homicide, sexual assault, taking hostages, kidnapping, burglary, robbery, and drug offenses. WIS. STAT. ANN. § 938.18 (West 2003 & Supp. 2004). In Vermont, the list of offenses that allow the state to transfer a juvenile between ten and fourteen include arson, murder, manslaughter, kidnapping, unlawful restraint, maiming, sexual assault, assault and robbery, and burglary. VT. STAT. ANN. tit. 33, § 5506(a) (2003).

49. *See* SICKMUND, *supra* note 47, at 10. For examples of these statutes, see ALA. CODE § 12-15-34.1 (2003 & Supp. 2004); ARIZ. REV. STAT. ANN. § 13-501 (2004); CAL. WELF. & INST. CODE § 602 (West 2003 & Supp. 2004); 42 PA. CONS. STAT. ANN. § 6355 (West 2003 & Supp. 2004). Prosecutorial discretion remains, such that the type of crime with which the youth is charged may determine whether she is tried as an adult or as a juvenile. *See* 705 ILL. COMP. STAT. ANN. 405/5-130(1)(a) (2004) (excluding from definition of delinquent minor any youth age fifteen or more charged with specified crimes).

50. *See* SICKMUND, *supra* note 47, at 9. For example, see COLO. REV. STAT. § 19-2-

Lawmakers have also responded to criticism of the juvenile system by narrowing the gap between juvenile court dispositions and criminal sentences. Dispositional jurisdiction for serious crimes has been extended into adulthood in many states, and others have introduced blended sentences completed in adult prison.[51] Moreover, whereas juvenile crimes were viewed traditionally as the mistakes of wayward youth and records were sealed, today youthful transgressions carry adult consequences. Juvenile convictions can be considered in adult sentencing, and can count under three-strikes laws.[52] In some states, juveniles who commit sex offenses against minors are subject to statutory registration requirements, under which they are permanently labeled and publicly identified as sex offenders.[53]

104(5) (West 2003); FLA. STAT. ANN. § 985.227 (West 2003 & Supp. 2005); MONT. CODE ANN. § 41-5-206 (2003).

51. One scholar explains that:

> The concept of extended juvenile jurisdiction, and its corollary, blended sentencing, allows the juvenile court judge to impose both a juvenile disposition and an adult sentence when a juvenile is found to have committed a serious offense. The adult sentence is stayed until the completion of the terms of the juvenile disposition.... Because the adult sentence is only imposed after the juvenile disposition, rehabilitation which occurs before that point, makes release from custody possible. On the other hand, if the juvenile violates the terms of the disposition or commits another offense, the adult sentence is implemented without the need for additional court proceedings.

Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 778–79 (2002). For examples of blended sentencing statutes, see CONN. GEN. STAT. ANN. § 46b-133c (West 2003 & Supp. 2004); IOWA CODE ANN. § 90 7.3A (West 2003 & Supp. 2004); MASS. GEN. LAWS ANN. ch. 119, § 58 (West 2004); TEX. FAM. CODE ANN. § 54.04 (Vernon 2004); VA. CODE ANN. § 16.1-272 (Michie 2003).

52. *See* PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996–97 UPDATE 8–12 (1998) (describing trend of opening juvenile court records); *id.* at 13 (describing use of juvenile record in adult sentencing); *see also* CAL. PENAL CODE § 667(d)(3) (West 2003 & Supp. 2005) (determining if juvenile offenses constitute a prior felony for purposes of sentencing enhancement).

53. TORBET & SZYMANSKI, *supra* note 52, at 13. "Megan's Law" statues were inspired by the outrage following the rape and murder of Megan Kanka by her neighbor in a New Jersey suburb. Joseph F. Sullivan, *Whitman Approves Stringent Restrictions on Sex Criminals*, N.Y. TIMES, Nov. 1, 1994, at B1. Statutory changes ensured that sex offenders would be required to register with the local police department and the community would be notified about that sex offender. N.J. STAT. ANN. § 2C:7-1 to 7-19 (West Supp. 2004). Recently, many states have made this information easily accessible via the Internet. For example, the Virginia State Police allow anyone to search their registry. *See Sex Offender and Crimes Against Minors Registry*, *at* http://sex-offender.vsp.state.va.us (last visited Jan. 13, 2005) (on file with the North Carolina Law Review). For a discussion of the application of these statutes to juveniles, see generally TORBET & SZYMANSKI, *supra* note 52. Some experts challenge the inclusion of juveniles under these statutes on the ground

As legislatures across the country enacted laws that dramatically altered the landscape of juvenile crime policy, the procedural issue of whether youngsters charged with crimes might be less able to participate in criminal proceedings than adult defendants was not central to the policy debates. Nor, for the most part, was it considered by legislatures toughening sanctions in juvenile court.[54] This is perhaps not surprising; as we have suggested, courts traditionally did not think of immaturity as a basis of trial incompetence, because youths (especially younger teens) were tried in juvenile court, a context that was presumed to be appropriately adapted to deal with this population.

Given that developmental incompetence has largely escaped the attention of courts and policymakers, it is worth asking directly whether the constitutional prohibition against criminal adjudication of incompetent defendants must be applied to this form of incapacity. The answer is surely "yes." The competence requirement is functional at its core, as it is directed toward particular purposes that are important in a criminal proceeding because the defendant's liberty is at stake. The requirement exists to protect the integrity of the proceedings, reduce error, and promote meaningful participation by the defendant. These purposes embody the underlying commitment to fair proceedings that is the essence of due process, and they are undermined when a defendant is incompetent, whatever the source of that defendant's incapacity.[55] Thus, the policy concerns that support the requirement of trial competence on the basis of mental illness or disability are implicated to the same extent when immature youths are subject to criminal proceedings.

The issue of developmental incompetence began to surface as reform policies were implemented and increasing numbers of immature youths faced prosecution in criminal court. The story of thirteen-year-old Lionel Tate focused national attention on the issue:

that juvenile sex crimes are often peculiarly linked to adolescent sexual development and differ in important ways from sex crimes by adults. *See* FRANKLIN ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 63–68 (2004).

54. An exception is the enactment of the Arkansas statute, under which a juvenile under the age of thirteen can receive extended juvenile jurisdiction or blended sentencing if she commits capital murder or first degree murder. The statute presumes those under the age of thirteen are incompetent to stand trial and requires the prosecution to overcome this presumption by a preponderance of the evidence. ARK. CODE ANN. § 9-27-502(b) (Michie 2003).

55. Courts have recognized the functional nature of the competence requirement in barring adjudication in the rare instances when defendants are incompetent due to a medical condition. *See supra* note 34.

Lionel rejected the state's generous plea offer against his attorney's advice and ultimately received a life sentence from the jury.[56] The unease expressed by many observers about Lionel's prosecution and conviction reflected, at least in part, a concern that the youth lacked the maturity to comprehend the stakes he faced or the consequences of his choice.[57] This case highlights a dilemma that now confronts policymakers—how to respond to the reality that immature youths may simply be less capable trial participants than adults and that some portion may be unable to adequately comprehend the meaning and consequences of criminal proceedings or to assist their attorneys in their defense.[58]

The punitive reforms present a more subtle challenge in the context of delinquency proceedings. Courts extending the competence requirement to delinquency proceedings in the post-*Gault* period did not focus on the immaturity of juveniles; indeed, as we have suggested, this provided the premise for maintaining a separate justice system. However, when adult sanctions are imposed in juvenile court, any distinction from a criminal proceeding evaporates and developmental incapacity becomes as important in this setting as it is in a criminal proceeding. Under some modern statutes, a twelve-year-old can face a twenty year sentence on homicide charges in a delinquency proceeding.[59] In this situation, his capacity to comprehend the jeopardy he faces and to assist his attorney is as important as it would be in a criminal trial.

56. For a description of Lionel's lack of comprehension during the trial, see *supra* note 10.

57. Lionel's case suggests the complexity of the ways that youthful immaturity can impede competence. Lionel rejected his attorney's advice that he accept the plea offer at the urging of his mother, who rejected any suggestion of culpability on Lionel's part. *See* Dana Canedy, *Sentence of Life Without Parole for Boy, 14, in Murder of Girl, 6*, N.Y. TIMES, Mar. 10, 2001, at A1 ("Ms. Grossett-Tate ... told Judge Lazarus before the sentencing that Tiffany's death was an accident and so she could not let her son plead guilty to homicide."). A more mature defendant than Lionel might have been better situated to assess his options with the aid of his attorney, free of undue influence by his mother, and to make a self-interested decision. Even the prosecutor expressed discomfort at the sentence of life imprisonment for a crime committed when Lionel was twelve. *See* Anne Hull, *Life Without Parole for Boy, 14*, WASH. POST, Mar. 10, 2001, at A1 (noting that the prosecutor was joining defendant's clemency plea for reduction of the sentence).

58. David Tanenhaus and Steven Drizin have examined the costly consequences of immaturity in the interrogation setting. *See* David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 677–78, n.150 (2002) (describing the risk of interrogating young children, who are far more likely than adults to give false confessions; in the case of victim Ryan Harris, two young boys were erroneously accused of rape and murder).

59. MASS. GEN. LAWS ANN. ch. 119, § 58 (West 2004). Generally, under blended sentencing regimes, youths can serve long sentences in adult prisons. *See supra* note 51.

II. ADOLESCENT DEVELOPMENT AND TRIAL COMPETENCE

In this Part, we examine the scientific basis of the construct of developmental incompetence. We begin by describing generally the developmental status of pre-teens and adolescents which clarifies important dimensions of psychological immaturity. This account, based on recent research, supports conventional intuitions that adolescents are less mature than adults. We then translate the legal criteria for competence to stand trial into specific abilities expected of the competent defendant. Finally, we will describe recent research that links scientific knowledge about youths' developmental status to capacities needed for trial participation. The analysis concludes that youths below age sixteen are significantly more likely than are adults to have deficiencies in capacities necessary for competent participation in criminal proceedings, and that, below age fourteen, the risk is substantial.

A. Psychological Development in Adolescence

Lawmakers usually define immaturity through bright line rules that establish the legal boundaries between childhood and adulthood for various purposes on the basis of age.[60] These boundaries are based partly on crude judgments about psychological development and partly on other policy concerns.[61] From a developmental perspective, age is a convenient but imprecise marker of the maturation process.[62] Thus, in creating (and evaluating) optimal legal age categories, the first step is to examine psychological development in the domains relevant to the legal task.

Four spheres of development—neurological, intellectual, emotional and psycho-social—affect the capacities of individuals to understand information and make decisions. In recent years, developmental research has enhanced our understanding of

60. *See* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 548 (2000) (describing the bases of legal age boundaries and arguing that, "for the most part, the regime of crude bright line rules operates efficiently").

61. For example, youths age sixteen can obtain driver licenses in most states, but cannot purchase alcohol until age twenty-one. This is justified as a means to limit drinking and driving by young individuals, which protects young drivers from their own immature judgment and also protects public safety. *Id.* at 547–48.

62. This is so in part because individuals vary a great deal in their developmental course, such that some twelve-year-olds may be more mature than many fifteen-year-olds in general or in specific domains. It is also due to variation in the pace of development in different spheres. *See infra* note 84.

adolescent development in these spheres, confirming what parents know from experience—that adolescents are in the process of developing adult capabilities, but they have not attained maturity.

1. Neurological Development

Neuroscience research on adolescent brain functioning, which probes the biological basis of psychological development, is a recent development; only in the past decade have scientists learned that brain development continues through adolescence.[63] This neurological development is especially evident in the early adolescent years, although it continues more slowly through middle adolescence.[64] One of the last areas of the brain to develop is the prefrontal cortex, which functions as a center for "executive cognitive functions" such as planning, organizing information, and thinking about possible consequences of action.[65] Another important function of the prefrontal cortex is "affect regulation"—the capacity to inhibit or delay impulsive and emotional reactions sufficiently to allow for rational consideration of appropriate responses.[66] Development of the pre-frontal cortex and of connections from this area to other regions of the brain continues through adolescence.

63. This research uses magnetic resonance imaging of the brains of individuals at various ages. *See, e.g.*, Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999) (demonstrating "nonlinear changes in cortical gray matter with a preadolescent increase followed by a post-adolescent decrease"); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. U.S. 8174 (2004) (reporting dynamic anatomical sequence of human cortical gray matter development between ages four and twenty-one); Elizabeth R. Sowell et al., *Localizing Age-Related Change in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping*, 9 NEUROIMAGE 587 (1999) (examining spatial location of changes in dorsal cortices of frontal and parietal lobes). These changes include continued growth of sheaths on neurons that improve their conductive efficiency (called "myelination") and the streamlining of neural connections so that transmissions are more efficient and less random (called "pruning"). Brain development stabilizes in later adolescence. Giedd, et al., *supra* at 861–62. For a description of the research of brain development in adolescence and its relevance to criminal behavior, see generally Mary Beckman, *Crime, Culpability and the Adolescent Brain*, 305 SCI. 596 (July 2004).

64. Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8821 (2001).

65. *See* ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND 35 (2001); Gogtay, *supra* note 63, at 8174.

66. Marsel Mesulam, *Behavioral Neuroanatomy, in* PRINCIPLES OF BEHAVIORAL AND COGNITIVE NEUROLOGY 1, 47 (Marsel Mesulam ed., 2d. ed. 2000); Peter R. Giancola et al., *Executive Cognitive Functioning and Aggressive Behavior in Preadolescent Boys at High Risk for Substance Abuse/Dependence*, 57 J. STUD. ON ALCOHOL 352, 358 (1996).

Youths in early and mid-adolescence generally are neurologically immature. Their brains are "unstable";[67] they have not yet attained their adult neurological potential to respond effectively to situations that require careful or reasoned decisions and they may be more inclined than adults to act impulsively and without planning. The upshot is that the recent neurological research reveals that psychological immaturity in adolescents (to which we now turn) likely has a basis in biology.

2. Intellectual Development

Cognitive development during adolescence has been the focus of scientific interest for many years and is now well documented. Intellectual capacities increase in childhood and into adolescence; although there is much variability among individuals, children and younger teens differ significantly from adults in their cognitive functioning. In part, this is simply because adults have more extensive experience. As youths enter and proceed through adolescence, they acquire new information through experience and education, and "practice" their cognitive abilities in a broader range of contexts.[68] Beyond the accumulation of knowledge and experience, intellectual development in adolescence also involves improvements in basic information processing skills, including organization, attention and short and long term memory. Early adolescence is characterized by gains in deductive reasoning and abstract thinking, including the ability to think about hypothetical situations and to consider that others have perspectives different from one's own.[69]

By mid-adolescence, tentative evidence suggests that teens' capacities for reasoning and understanding may roughly approximate

67. *See* Beckman, *supra* note 63, at 599.

68. *See generally* BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (Anne Parsons & Stanley Milgram trans., 1958) (describing changes in adolescents' logistical capacities and the means of identifying full development of individuals' intelligence); JEAN PIAGET, GENETIC EPISTEMOLOGY (Eleanor Duckworth trans., 1970) (illustrating the problems and principles of genetic epistemology through examples of child and adolescent intellect development); ROBERT S. SIEGLER & MARTHA WAGNER ALIBALI, CHILDREN'S THINKING 55–64 (4th ed. 2005) (evaluating Piaget's theory and the ongoing relevance of his work); *id* at 26–62 (outlining Piaget's theory and updating it based on new data).

69. *See* sources cited *supra* note 68. This ability is required, for example, to understand that what has happened to someone else when they made a particular decision is likely to happen to oneself, or that what one experienced in a different situation in the past might be applicable to a current one. *Id.*

that of adults—at least in the abstract.[70] However, little research examines adolescent decisionmaking in stressful and unstructured contexts, where choices have personal salience and decisionmakers must rely on experience and knowledge.[71] These factors may impede the effective use of youthful cognitive capacities.

3. Emotional Development

Youths and adults also differ in their capacity for impulse control—the ability to delay response in situations in which emotional arousal is high. Impulse control allows reactions to be influenced not only by emotion, but also by reason, and particularly by consideration of probable consequences. Children acquire impulse control in stages from birth through adulthood through an iterative learning process that must be undergone at each new developmental stage.[72] This is necessary because, as children acquire capacities, their unfamiliarity with the consequences of new-found abilities results in inevitable "miscalculations," requiring parental or societal responses that define acceptable limits of behavior. During the years between twelve and fifteen, impulse control improves, as adolescents struggle with new demands for self-direction and self-management; for some adolescents the process extends well into middle or late adolescence.[73]

70. INHELDER & PIAGET, *supra* note 68, at 335 (explaining that certain logic structures reach an equilibrium point at about fourteen to fifteen years of age). It is suggested that:

> The evidence is tentative for two reasons. First, it is based in part on Piaget's stage theory of cognitive development, which has been challenged by modern cognitive scientists. Cognitive psychologists now accept that skills develop at different rates in different domains, and competence to make one kind of decision cannot be generalized . . . [Second,] the claim is tentative because it is supported by a group of small research studies conducted in laboratory settings that for the most part involved white middle class subjects and no adult control groups.

Scott & Steinberg, *supra* note 3, at 812 n.55.

71. Decisionmaking under stress is often poorer than in ideal conditions. Leon Mann, *Stress, Affect, and Risk Taking*, *in* RISK-TAKING BEHAVIOR 201, 214–15 (J. Frank Yates ed., 1992). It has been proposed, but not yet demonstrated, that the effects of stress on decisionmaking may be more marked for adolescents than for adults. *See* Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents' Judgment and Culpability*, *in* YOUTH ON TRIAL, *supra* note 3, at 338–39 (calling for research to explore how group pressure's influence on decisionmaking varies with the decisionmaker's age).

72. Richard E. Tremblay, *The Development of Physical Aggression During Childhood and the Prediction of Later Dangerousness*, *in* CLINICAL ASSESSMENT OF DANGEROUSNESS: EMPIRICAL CONTRIBUTIONS 47, 59–60 (Georges-Franck Pinard & Linda Pagani eds., 2001).

73. Recall also, from the previous discussion, that early adolescence is a period when neurological development related to the control of emotion during decisionmaking is still ongoing. *See* Nancy G. Guerra et al., *Moral Cognition and Childhood Aggression*, *in*

4. Psychosocial Development

Adolescents generally are less mature than adults in psychosocial development, which influences the way they approach decisions, particularly in the context of social relations.[74] Several dimensions of psychosocial development may be of particular interest for our purposes: risk perception and preference, future orientation, and response to adult and peer influence. Each of these factors may contribute to adolescent decisions that reflect immature judgment.[75]

Research evidence indicates that adolescents differ from adults in their perception of and attitude toward risk. Adolescents are less risk averse than adults, in that they tend to weigh anticipated gains more heavily than losses in making choices to a greater extent than adults.[76] Youths also, on average, tend to be greater risk-takers, engaging more frequently in behaviors such as drunken driving, unprotected sex and criminal activity.[77] It is uncertain how much youthful discounting of risk represents a lesser ability than adults to recognize risks (risk perception) or a greater inclination to discount their likelihood or seriousness (risk preference).

Future orientation, the capacity and inclination to project events into the future and consider future consequences, increases in the period between childhood and young adulthood.[78] Adolescents tend to focus on the short-term risks and benefits of decisions and to pay less attention to long-term consequences than do adults.[79] The age

AGGRESSIVE BEHAVIOR: CURRENT PERSPECTIVES 13, 23 (L. Rowell Huesmann ed., 1994).

74. These differences probably are the consequence in part of neurological, intellectual and emotional types of immaturity already discussed. Developmental psychologists, however, view these factors as additional dimensions of maturation. Cauffman & Steinberg, *supra* note 71, at 331.

75. *See* Elizabeth S. Scott et al., *Evaluating Adolescent Decisionmaking in Legal Contexts*, 19 L. & HUM. BEHAV. 221 (1995).

76. *See* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT RISK TAKING 66, 78–79 (Nancy J. Bell & Robert W. Bell eds., 1993); Alida Benthin et al., *A Psychometric Study of Adolescent Risk Perception*, 16 J. ADOLESCENCE 153, 166 (1993); Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 1–2 (1992).

77. *See* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339–43 (1992); Furby & Beyth-Marom, *supra* note 76, at 1–2.

78. *See* A.L. Greene, *Future-Time Perspective in Adolescence: The Present of Things Future Revisited*, 15 J. YOUTH & ADOLESCENCE 99, 100 (1986); Jari-Erik Nurmi, *How Do Adolescents See Their Future?: A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1, 47–49 (1991).

79. *See* William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, *in* ADOLESCENTS IN THE AIDS EPIDEMIC 17, 17 (William Gardner et al. eds., 1990); Greene, *supra* note 78, at 100; Nurmi, *supra* note 78, at 47–49.

gap in future orientation may be due to the limited cognitive abilities of adolescents to think hypothetically; it may be harder for them to think of remote events. The gap may also be due to adolescents' more limited life experience; a consequence that will take place years in the future may simply seem too remote to be given substantial weight.[80]

Finally, adolescents may differ from adults in the extent to which others, including adult authority figures and peers, influence their choices. Adolescence is a sometimes turbulent period of individuation, separation from parents, and movement toward autonomy and self-direction—processes that can generate ambivalence.[81] Thus, adolescents can respond to authority figures compliantly or oppositionally, depending on their mood, developmental stage, or personal predilection. In addition, substantial evidence supports that adolescents are more susceptible to peer influence than are adults. This susceptibility increases in early adolescence as part of the process of individuating from parents; it peaks at about age fourteen and declines slowly thereafter.[82] At least during the period of early- and mid-adolescence, decisions often are driven by acquiescence or opposition to authority or by efforts to gain peer approval (or avoid peer rejection).[83]

5. Age and Development

Although policymakers draw age boundaries between childhood and adulthood, it is not possible to point to a particular age at which youths attain adult-like psychological capacities. First, the changes associated with the four spheres of development do not necessarily occur together, and even within spheres, different capacities may develop at different rates.[84] Second, there is a great deal of individual

80. Gardner, *supra* note 76, at 78–79.

81. LAURENCE STEINBERG, ADOLESCENCE 263–65 (5th ed. 1999) (summarizing research on the development of moral reasoning, religious beliefs, and political views, and indicating a consolidation of values during the middle and late adolescent years).

82. *See* Scott et al., *supra* note 75, at 229–30; Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decisionmaking*, 20 LAW & HUM. BEHAV. 249, 257–59 (1996); Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841, 848 (1986). Changes in susceptibility to peer pressure may reflect changes in individuals' capacity for self-direction or, as some theorists have suggested, changes in the intensity of pressure that adolescents exert on each other. *See* B. Bradford Brown, *Peer Groups and Peer Cultures*, *in* AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 171, 171–72 (S. Shirley Feldman & Glen R. Elliott eds., 1990).

83. Cauffman & Steinberg, *supra* note 71, at 331.

84. Psychosocial development generally proceeds more slowly than neurological or

variability among youths at any given age in all spheres of development. For example, an intelligent twelve-year-old may have a greater capacity to think abstractly than many fifteen-year-olds. Nevertheless, a significant body of developmental research indicates that, *on average*, youths under the age of fourteen differ significantly from adolescents sixteen to eighteen years of age in their level of psychological development, with youths in the middle years showing similarities to and differences from both groups.[85]

B. *A Taxonomy of Competence-Related Abilities*

The spheres of psychological development described above affect the functioning of individuals as trial participants; thus, the research on differences between adolescents and adults provides the basis for understanding how developmental immaturity affects youths' competence to stand trial. We turn now to the legal requirements of competence to identify those abilities that are important to functioning adequately in the role of criminal defendant.

Three broad types of abilities are implicated under the *Dusky* standard for competence to stand trial: (1) a factual understanding of the proceedings, (2) a rational understanding of the proceedings, and (3) the ability to assist counsel.[86] Although the standard directs courts to consider these types of abilities, it provides no clear guidance about their relative importance or about the level of competence required for each. Few adult defendants have a comprehensive mastery over all information that is relevant to their criminal trial or function as a sophisticated partner to their attorney in developing a defense. The standard permits courts to exercise substantial discretion in deciding "how much ability is enough" for competence, as long as each of these factors is weighed in the deliberation.

1. Factual Understanding

The factual understanding component of the *Dusky* standard has been extensively described and analyzed.[87] This requirement focuses

intellectual maturity because it involves the application and practice of maturing capacities in other spheres. *See id.* at 331.

85. The differences between adolescents and adults in these spheres of development decrease across age groups, such that sixteen- to eighteen-year-olds manifest few differences from adults in some respects. *Id.* at 330–31.

86. *See* Dusky v. United States, 362 U.S. 402, 402 (1960).

87. *See generally* THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS (2d ed. 2003) (explaining the principles and values of legally relevant competence evaluations using an empirical framework); GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS (2d ed. 1997)

on the defendant's knowledge and awareness of the charges and understanding of the nature of available pleas and possible penalties, the general steps in the adjudication process, the roles of various participants in the pre-trial and trial process, and the defendant's rights in this process. Courts assessing factual understanding are concerned with capacity rather than actual understanding to the extent that these can be distinguished; thus, a defendant's deficits in this realm will rarely be the basis of a finding of incompetence to stand trial, as long as she has the capacity to learn from brief instruction.[88] Adult defendants with mental retardation may be disadvantaged in this area. Intellectual immaturity in juveniles may also undermine this capacity, especially in light of their lesser experience and more limited ability to grasp abstract concepts such as "rights."[89] Juveniles also may be more likely than adults to have extensive deficits in their basic knowledge of the trial process, such that more than brief instruction is needed to attain competence.

2. Rational Understanding

The rational understanding requirement of *Dusky* has been interpreted to mean that defendants must comprehend the implications and significance of what they understand factually regarding the trial process.[90] Deficits in rational understanding typically involve distorted or erroneous beliefs that nullify one's factual understanding.[91] For example, an immature defendant may know that he has a right to remain silent, yet believe that the judge can take this "right" away at any time by demanding a response to questions.[92] In general, immaturity in the intellectual, emotional and psychosocial spheres may undermine the ability of some adolescents to grasp accurately the meaning and significance of matters that they seem to understand factually.

(providing a guide for judges and mental health examiners on insanity, civil commitment, and other legal issues of mental capacity); RONALD ROESCH & STEPHEN L. GOLDING, A SYSTEMS ANALYSIS OF COMPETENCY TO STAND TRIAL (1980) (studying forensic procedures used to determine competency to stand trial in North Carolina with recommendations for change).

88. MELTON ET AL., *supra* note 87, at 122.

89. *See* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 42–53 (1981); Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, *in* YOUTH ON TRIAL, *supra* note 3, at 139–40.

90. GRISSO, *supra* note 87, at 84.

91. *See supra* note 75. To draw again on the Lionel Tate case, a youth might also be able to describe the terms of a plea agreement that he rejects, but not actually comprehend the consequences of conviction or the meaning of a long sentence.

92. *See* Grisso, *supra* note 89, at 148.

3. Assisting Counsel and Decisionmaking

The function of assisting counsel in a criminal proceeding has been associated with three types of abilities.[93] One is the defendant's capacity to receive and communicate information adequately to allow counsel to prepare a defense. This ability may be impaired by deficits that interfere with attention and concentration, which may undermine the defendant's ability to respond to instructions or to provide important information—such as a coherent account of the events surrounding the offense. Second, the ability to assist counsel requires a rational perspective on the attorney and her role, free of notions or attitudes that could impair the collaborative relationship. Third, defendants must have the capacity to make decisions about pleading and the waiver or assertion of other constitutional rights.[94] These decisions involve not only adequate factual and rational understanding, but also the ability to consider alternatives and make a choice in a decisionmaking process. These abilities can be compromised by mental disorders and mental retardation. In addition, due to intellectual immaturity, youths may lack adequate capacities to process information and reason in making trial decisions, especially when the options are complex and their consequences far-reaching. Moreover, emotional and psychosocial immaturity may influence youths to make choices that reflect immature judgment.[95]

As the last Section demonstrated, scientific knowledge clarifies that adolescents are in a process of acquiring the intellectual, emotional and psychosocial abilities of adults. Because of their psychological immaturity, youths may be less capable than are adults of exercising the various abilities associated with competent trial participation. However, general developmental psychology knowledge provides only indirect evidence about the capacities of youths in this context. What has been lacking until recently is research that addresses directly whether adolescents' immaturity actually impairs the abilities required for competent trial participation.

93. *See supra* note 65.

94. Although the capacity to make decisions is not explicitly required by *Dusky*, it was described as an important part of competence to stand trial by the United States Supreme Court in *Godinez v. Moran*, 509 U.S. 389, 397–99 (1993).

95. *See infra* notes 114–16 and accompanying text. An example in a related context is the greater tendency of youths than adults to waive Miranda rights. *See* Grisso, *supra* note 89, at 192.

C. *The MacArthur Juvenile Adjudicative Competence Study*

As juveniles' competence to stand trial began to emerge as an important issue in recent years, the need for a comprehensive study comparing the abilities of adolescents and adults in this setting became apparent. In this Section, we will describe the MacArthur Juvenile Adjudicative Competence Study, which was conducted in response to that need. The study was designed to examine empirically the theoretical relationship between developmental immaturity and the abilities of young defendants to participate in their trials.[96] It did not aim to evaluate explicitly adolescents' competence to stand trial, recognizing that this is a legal judgment. Rather the purpose of the study was to determine: (1) whether adolescents and adults differ in abilities implicated under the *Dusky* standard; (2) if so, in what ways and to what extent; (3) whether abilities are related to age, gender, justice system involvement, and to intellectual and psychosocial development.

1. The Study's Method

a. The Sample

The MacArthur Juvenile Adjudicative Competence Study included 927 youths and 466 young adults (age eighteen- to twenty-four) in four communities in the United States.[97] The adult and youth groups each included two subgroups matched for age, gender and ethnicity—participants involved in the justice system and "community" participants—individuals from the same neighborhoods without justice system involvement.[98] The youth participants included

96. The study summarized here is described in detail in Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) [hereinafter Study Summary]. The study was conducted by the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. *Id.* at 362.

97. The study sites were Los Angeles, Philadelphia, Gainesville, Florida, and northern and central Virginia. *Id.* at 338.

98. About half the juveniles were in juvenile detention centers and half the adults were in adult jails awaiting adjudication. Current charges for the detained youths were primarily (about 80%) offenses against persons and offenses against property, in about equal proportions. The distribution of charges was similar in the youth and young adult groups, except that drug-related charges were more frequent in the detained adult sample (32%) than in the detained youth sample (10%). *Id.* at 337–38.

Females comprised about one-third of the samples, and the ethnic and racial groups represented included 40% African-American, 23% Latino, 35% non-Latino White, and about 2% from other ethnic minorities. The great majority of the youths and adults were of lower to low-middle socioeconomic status. *Id.* at 337.

three age categories—eleven to thirteen (20% of the youth sample), fourteen to fifteen (37%), and sixteen to seventeen (43%).

b. Measures

Along with an intelligence test[99] and a measure of symptoms of mental or emotional disturbance,[100] all study participants were administered two instruments designed to assess abilities relevant to competence to stand trial.[101] The first, the MacArthur Competence Assessment Tool-Criminal Adjudication ("MacCAT-CA"), was developed independent of this study specifically to assess (1) individuals' understanding of charges, penalties, pleas, and roles of trial participants, and (2) their ability to communicate relevant facts to counsel and to reason about a plea offer through a standardized interview procedure.[102] The MacCAT-CA was administered by its developers to large numbers of adult defendants (in jails) for whom competence was not questioned, as well as to individuals in forensic psychiatric facilities who had recently been found incompetent to stand trial.[103] The norms based on these adult defendants were used to set a cut-off score.[104] Scores below the cut off were considered to represent significant impairment and were far more frequently achieved by persons who had been found incompetent to stand trial.[105]

The study also used a second measure of performance, the MacArthur Judgment Evaluation ("MacJEN"), which was designed for this study to assess psychosocial influences on decisionmaking related to trial participation. Through a standardized interview

99. *Id.* at 339; DAVID WECHSLER, PSYCHOLOGICAL CORP., WECHSLER ABBREVIATED SCALE OF INTELLIGENCE (1999).

100. Study Summary, *supra* note 96, at 339; THOMAS GRISSO & RICHARD BARNUM, MASSACHUSETTS YOUTH SCREENING INSTRUMENT-SECOND VERSION: USERS MANUAL AND TECHNICAL REPORT (2000).

101. Detained youths and adults were also administered an index of prior justice system experience inquiring whether they had ever before been either (1) "found guilty" of a crime or (2) "locked up" in a detention center or jail. Study Summary, *supra* note 96, at 339.

102. *See* ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 112 (Poythress et. al., eds. 2002). Items in the assessment instrument are scored 2 (adequate), 1 (questionable), or 0 (inadequate) according to strict criteria for each item provided in the manual. The total score for the first set of items ("1" above, 8 items) is called the "Understanding" score, and the total for the second group ("2" above, 8 items) is called the "Reasoning" score. *Id.* at 113.

103. *Id.* at 115.

104. *Id.* at 116.

105. *Id.* at 117–18.

process, participants were asked to make choices and to explain their reasons, in response to three hypothetical vignettes involving police questioning, consultation with an attorney, and a plea offer.[106] The instrument was designed to assess whether individual responses and explanations for their choices were related to risk perception, future orientation, or influence.[107]

2. The Study's Results

The findings of the study confirmed the hypothesis that competence-related abilities improve with age during adolescence.[108] On average, youths ages eleven to thirteen demonstrated significantly poorer understanding of trial matters, as well as poorer reasoning and recognition of the relevance of information for a legal defense, than did fourteen- to fifteen-year-old youths, who in turn performed significantly more poorly on average than did sixteen- to seventeen-year-olds and young adults. There were no differences between the sixteen- to seventeen-year-olds and the young adults. The study produced similar results when adolescents and adults were identified according to their scores above or below cut-off scores for significant impairment. Thirty percent of eleven- to thirteen-year-olds and 19% of fourteen- to fifteen-year-olds, but only 12% of sixteen- to seventeen-year-olds and of young adults evidenced deficits in either (or both) Reasoning or Understanding in their responses on the MacCat-CA.[109]

Intelligence test scores ("IQ") were also significantly related to

106. The first vignette focused on a decision to waive the right to silence; the second involved a decision to reveal information to counsel; and the third dealt with a plea decision of either taking a plea offer or refusing the offer and going to trial. Study Summary, *supra* note 96, at 340.

107. *See supra* notes 67–76 and accompanying text.

108. Study Summary, *supra* note 96, at 356. These findings are based on the Understanding and Reasoning scores on the MacCAT-CA. In general, we will describe only the main significant results of the study, without reference to the statistical details (which are provided in the original report). The term "significant" when referring to differences between groups in the following descriptions means that statistical analysis indicated that two groups differed to an extent that would not be likely by chance.

109. *Id.* at 343–46. Because the question of individuals' competence can involve deficits in either Understanding or Reasoning, an assessment of impairments in individuals in different age categories must count low scores in either of these dimensions. Twenty percent of eleven- to thirteen-year-olds and 13% of fourteen- to fifteen-year-olds showed significantly impaired Understanding, whereas only 7% of sixteen- to seventeen-year-olds and the same proportion of young adults scored in the significantly impaired range. Results were similar for Reasoning. Some individuals scored below the cut-off in both dimensions, while some had a low score in only one. *Id.*

MacCAT-CA Understanding and Reasoning,[110] with low IQ youths in the younger age groups being particularly likely to evidence serious deficits, showing "significant impairment." For example, for youths who scored 60–74 on IQ measures, 55% of eleven- to thirteen-year-olds and 40% of fourteen- to fifteen-year-olds scored in the significantly impaired range on the Understanding or Reasoning sections on the MacCAT-CA. These results are especially important because a greater proportion of detained youths were in the lower IQ ranges compared to community youths, a finding that is consistent with other research.[111] However, although intelligence was a significant factor in accounting for individuals' performance on the MacCAT-CA, the relation between age and performance was important independent of intelligence.[112]

Further analyses indicated that MacCAT-CA Understanding and Reasoning scores did not differ significantly according to gender, ethnicity, or, in the detained groups, to the extent of prior justice system experience. They also were not related to youths' scores on the measure of mental and emotional disturbances.[113]

The MacJEN interview instrument, designed to measure psychosocial influences on decisionmaking, assessed individuals'

110. *Id.* at 344. For example, "significant impairment" scores on either Understanding or Reasoning were obtained by about 40% of individuals with IQ scores of 60–74, 24% of individuals with IQ scores of 75–89, and 7% of individuals with IQ scores of 90 and above. *Id.*

111. Youth with intellectual impairments are disproportionately represented in juvenile justice facilities. Peter Leone & Sheri Meisel, *Improving Education Services for Students in Detention and Confinement Facilities*, 17 CHILD LEGAL RTS. J. 1, 2–3 (1997). About 13% of juvenile offenders are mentally retarded, and about 36% have learning disorders. Pamela Casey & Ingo Keilitz, *Estimating the Prevalence of Learning Disabled and Mentally Retarded Juvenile Offenders: A Meta-Analysis*, *in* UNDERSTANDING TROUBLED AND TROUBLING YOUTH 82, 86 (Peter Leone ed., 1990). Low intelligence is associated generally with delinquent behavior and conduct disorders. PAUL J. FRICK, CONDUCT DISORDERS AND SEVERE ANTISOCIAL BEHAVIOR 46–47 (1998); Travis Hirschi & Michael J. Hindelang, *Intelligence and Delinquency: A Revisionist Review*, 42 AM. SOC. REV. 571, 584 (1977).

112. Study Summary, *supra* note 96, at 348–50. For example, while detained youths on average were much lower in IQ than the community youths, the differences across age groups (described earlier) were apparent for both detained and community youths compared to detained and community adults. *Id.*

113. Note, however, that this does not mean that youths with mental disorders will perform similarly on competence abilities to youths without mental disorders. The measure used in this study did not provide diagnoses of mental disorders, but rather mental and emotional distress. Moreover, it is unlikely that our samples included detained youths with serious mental disorders. The youths were in pretrial detention centers, and seriously mentally ill youths referred to the juvenile justice system are not likely to be retained in detention centers, but rather referred to mental health facilities in order to provide emergency responses to their mental disorders.

choices in three hypothetical legal situations. Significant differences among age groups were found in choices on the police interrogation and the plea agreement vignette. For example, youths were much more likely to recommend waiving constitutional rights in interrogation than were adults, with 55% of eleven- to thirteen-year-olds, 40% of fourteen- to fifteen-year-olds, and 30% of sixteen- to seventeen-year-olds choosing to "talk and admit" involvement in an alleged offense (rather than "remain silent"), whereas only 15% of the young adults made this choice.[114] The plea agreement vignette was styled so as not to clearly favor accepting or rejecting the state's offer, which probably accounted for the fact that young adults were evenly divided in their responses. In contrast, 75% of the eleven- to thirteen-year-olds, 65% of fourteen- to fifteen-year-olds, and 60% of the sixteen- to seventeen-year-olds recommended accepting the plea offer. Together, these results suggest a much stronger tendency for adolescents than for young adults to make choices in compliance with the perceived desires of authority figures.

Analysis of participant responses to the MacJEN vignettes also found evidence of differences in risk perception and future orientation between the youngest age group and older subjects. Participants were asked to explain their choices, including perceived positive and negative consequences of various options; questions probed the subjects' assessment of the seriousness of risks (the perceived negative consequences) and likelihood of occurrence.[115] Analyses indicated age differences for all of these dimensions of "risk perception," with the eleven- to thirteen age group scoring lower than the sixteen- to seventeen-year-olds and young adults. Similarly, eleven- to thirteen-year-olds reported significantly fewer long-range consequences than did older adolescents, suggesting differences in future orientation.[116]

3. Other Research on Youths' Capacities in the Adjudicative Process

The MacArthur Juvenile Adjudicative Competence Study provides the most comprehensive and targeted investigation to date

114. Defense attorneys uniformly would agree that admitting involvement in the crime, unless advised to do so by counsel is almost always a choice that is not in the defendant's interest. Eighty percent of adults favored remaining silent.

115. The MacJEN provided a method for categorizing and scoring individuals' explanations according to several psychosocial factors. Study Summary, *supra* note 96, at 353–56.

116. Somewhat similar results were found for a set of "resistance to peer influence" indexes, but the results varied with regard to one's choice in ways that did not provide for confident interpretation.

comparing youths' and adults' abilities as trial defendants. Several other studies, however, have produced results that are consistent with the MacArthur study findings. For example, a study of youths' and adults' capacities to understand *Miranda* rights found that, as compared to adults in the criminal justice system, fourteen-year-old youths in juvenile detention manifested significantly inferior comprehension of the meaning and importance of *Miranda* warnings.[117] Other studies using smaller samples have found age differences across the adolescent years with regard to knowledge of legal terms and the legal process in delinquency/criminal adjudication.[118] Although few studies before the MacArthur study examined youths' reasoning and decisionmaking in the context of adjudication, an exception is a series of studies that found significant age differences across the adolescent years in "strategic thinking" about pleas. The researchers found older adolescents more likely than younger subjects to make choices that reflected calculations of probabilities and costs based on information provided.[119]

4. Summary and Implications

The MacArthur Juvenile Adjudicative Competence Study found that adolescents younger than sixteen years of age are significantly

117. GRISSO, *supra* note 89. The study involved about 400 youths aged fourteen and under and 200 adults.

118. *See* Deborah K. Cooper, *Juveniles' Understanding of Trial-Related Information: Are They Competent Defendants?* 15 BEHAV. SCI. & L. 167, 177–78 (1997); Vance Cowden & Geoffrey McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney-Client Relationship*, 33 LOUISVILLE J. FAM. L. 629, 651–57 (1995); Michele Peterson-Badali & Rona Abramovitch, *Children's Knowledge of the Legal System: Are They Competent to Instruct Legal Counsel?*, 34 CANADIAN J. CRIMINOLOGY AND CRIM. JUST. 139 (1992); Michele Peterson-Badali et al., *Young Children's Legal Knowledge and Reasoning Ability*, 39 CANADIAN J. CRIMINOLOGY AND CRIM. JUST. 145 (1997); Jeffrey C. Savitsky & Deborah Karras, *Competency To Stand Trial Among Adolescents*, 19 ADOLESCENCE 349 (1984); Barbara Zaremba, Comprehension of Miranda Rights by 14- to 18-Year-Old African American and Caucasian Males With and Without Learning Disabilities (1992) (unpublished Ph.D. dissertation, College of William and Mary). These studies involved no adult comparison groups.

119. *See* Rona Abramovitch et al., *Young People's Understanding and Assertion of Their Rights to Silence and Legal Counsel*, 37 CANADIAN J. CRIMINOLOGY AND CRIM. JUST. 1 (1995); Michele Peterson-Badali & Rona Abramovitch, *Grade Related Changes in Young People's Reasoning About Plea Decisions*, 17 LAW & HUM. BEHAV. 537, 549–50 (1993); Peterson-Badali et al., *supra* note 118. When hypothetical pleading situations were varied in terms of seriousness of offense charged and strength of evidence against the defendant, most mid- and late-adolescent youths made choices that reflected the different "odds" and "costs" in these conditions. But adolescents under fourteen years of age were much less likely to alter their responses in ways that made sense "strategically."

more likely than adults to manifest deficits in abilities that are important to competent trial participation. The risk of competence-related deficits was high for youths under fourteen years of age, and those younger adolescents with poor intellectual abilities showed the highest level of risk. This is significant, because the average IQ for youths in detention centers (the group whose competence is actually at issue in criminal proceedings) is about 85, far below the average of 100 for youths in general. In addition, the study found significant differences between adolescents and young adults in choices related to adjudication, with the youngest group more often making choices that seemed to reflect acquiescence to the perceived wishes of authority figures. Moreover, younger adolescents' reasons for their choices were consistent with expectations based on developmental psychology research that many adolescents display psychosocial immaturity in the areas of risk perception and consideration of long-range consequences.

The limitations of these results should be emphasized. The fact that younger participants scored more frequently than adults in the "significantly impaired" range on the MacCAT-CA does *not* necessarily mean that all such youths should be considered incompetent to stand trial.[120] That is a legal judgment that may be based on a broader range of abilities than is measured by the MacCAT-CA, which only inquires about understanding of a limited number of facts about the charges and roles of trial participants, reasoning regarding a hypothetical decision (not the youth's own case), and does not probe communication and other abilities that might be important in assisting counsel.[121]

For several reasons, however, the results of this study likely do not overstate the risk of incompetence to stand trial among youths charged with crimes. First, as mentioned, the intellectual functioning of youths in the justice system is likely to be lower than community means, and this deficit is likely to be associated with impaired competence. Second, some youths who performed marginally (but

120. There were several groups of defendants in the original MacCAT-CA study. For some the question of competence had never been raised during their adjudication and they were presumed competent. Others had been found incompetent by judges and they were being treated to restore their competence. Not all incompetent individuals scored in the "significantly impaired" range when tested, and some competent individuals scored in the "significantly impaired" range. But a greater proportion of incompetent than competent defendants scored in that range. Study Summary, *supra* note 96, at 340.

121. Moreover, some individuals scoring in the "significantly impaired" range might be able to perform better as defendants if given proper assistance, thus obviating the need to find them incompetent to stand trial. *Id.*

not in the "significantly impaired" range) on the MacCAT-CA may be impaired in other capacities related to adequate trial performance that are not measured by this instrument. Finally, although the MacArthur Study included youths with mild or moderate mental illness or retardation, youths with serious illness or disability were excluded.[122] The inclusion of such youths would undoubtedly have produced a greater proportion of youths with "significantly impaired" performance on the MacCAT-CA.

In light of general developmental knowledge about psychological maturation in early- and mid-adolescence, the findings of the MacArthur study are not surprising. Indeed, given the abilities required of defendants in criminal proceedings, it would be puzzling if youths and adults performed similarly on the competence-related measures. The study provides powerful and tangible evidence that many youths facing criminal charges may function less capably in the role of criminal defendant than do their adult counterparts.

III. TAKING COMPETENCE SERIOUSLY: A FRAMEWORK OF REFORM

In this Part, we explore the implications for contemporary criminal justice policy of taking seriously the scientific evidence that we have described. At a minimum, the research on adolescent development and adjudicative competence challenges courts to consider incompetence claims based on immaturity along with those caused by mental illness and disability. We will argue, however, that the features that distinguish incompetence based on immaturity from the more familiar variations make this simple doctrinal response inadequate. The incorporation of a developmental competence requirement into youth crime regulation necessitates more extensive institutional and doctrinal adjustments, if substantial disruption of criminal and juvenile proceedings is to be avoided. Most importantly, the adoption of dual standards of competence is necessary if juvenile delinquency proceedings are to serve as default dispositions for youths found incompetent in criminal courts; generally, this is the key to avoiding an institutional crisis under which large numbers of incompetent youths cannot be adjudicated in either court. We argue that youths who are incompetent under the *Dusky* standard can be

122. The study excluded youths with IQ scores below 60. Moreover, there were few if any youths in the study who had mental disorders serious enough to require psychiatric care, because those youths typically would have been diverted to psychiatric hospital units and thus would not have been available as research subjects in the juvenile detention centers where the study was performed. *Id.*

subject to a relaxed competence standard in juvenile court without violating constitutional norms so long as the dispositions to which they are subject are different in purpose and punitiveness from criminal sentences. We then explore dispositional options for the (small number of) youths who are incompetent even under the standard applied in juvenile court. Finally, we examine the options for institutional reform of the juvenile court available to lawmakers responding to the challenge we raise.

A. The Unique Features of Developmental Incompetence

In the context of the recent punitive reforms, the scientific evidence that we have described challenges both juvenile and criminal courts to assure that youths who are incompetent on the basis of immaturity are not subject to adjudication. This information may lead courts and legislatures simply to expand the category of juvenile defendants subject to assessment, determination, and treatment of competence to include youths of questionable capacity due to their immaturity. Predictably, as developmental incompetence gains recognition, attorneys and judges will become attuned to discerning these incapacities in immature youths in the trial context and take steps to protect them. Under this "minimalist" response, courts applying the *Dusky* standard will determine whether individual youths are capable of understanding the proceedings and assisting counsel and will exclude those who are not until their competence is demonstrated.

Although a few jurisdictions appear to have adopted this approach to developmental competence,[123] it likely will prove inadequate as a response that satisfies the requirements of fairness and due process without seriously disrupting the functioning of the justice system. This is so because two features of developmental incompetence distinguish the incapacities of youths from those of mentally ill or retarded defendants whose competence is uncertain—features that may point to a need for different policy responses. First, the incidence of trial incompetence is likely to be much higher among teens (until age sixteen) than among adult defendants. Second, the standard "remedy" for incompetence—a brief intervention based on medication and instruction—may not suffice for youths whose incapacities are due to immaturity.

As we have indicated, a small percentage of seriously impaired

123. *See* VA. CODE ANN. § 16.1-169.1 (Michie 2004); VA. COMM'N ON YOUTH, STUDY OF JUVENILE COMPETENCY ISSUES IN LEGAL PROCEEDINGS, H. Doc. No. 42 (1999).

adult defendants are referred for competence evaluations and an even smaller percent are found to be incompetent to stand trial. In contrast, the MacArthur study indicates that more than one-third of youths age eleven to thirteen years may have significant impairments in competence-related abilities, and the capacities of a substantial percentage of fourteen- and fifteen-year-olds are questionable as well. The significance of these findings, which are compatible with other competence studies and with general developmental knowledge, should not be minimized. If a substantial portion of defendants under age sixteen are likely to be of questionable competence, then a youth in this age category should not be subject to criminal prosecution until a court has determined that she is competent on the basis of an evaluation, unless the defense, prosecution, and court agree that it is unnecessary. Moreover, the research suggests that, under the conventional *Dusky* standard, a substantial percentage of younger adolescents in *juvenile* court may be at risk for incompetence. The upshot is that, in contrast to the incidence of competence inquiries among adult defendants, the issue is salient for most, if not all, youths under the age of sixteen.[124]

The second difference between immaturity-based impairments of competence and those caused by mental illness and retardation is that the standard disposition provided to incompetent defendants may not be appropriate or effective for many youths. Defendants found incompetent to stand trial under most statutes are committed to a mental health facility for a brief period to be restored to competence through a program that usually combines intensive instruction and psychotropic medication directed at alleviating psychotic symptoms.[125]

124. To be sure, a substantial percentage of mid-adolescents will likely be competent. However, the percentage of youths at risk for incompetence in this category is high enough that attorneys should routinely consider whether their young clients' competence is in doubt.

125. Most incompetent defendants are required to participate in competence training, which includes instruction about the trial, the participants, the charges facing the defendant, the meaning of pleas, and the possible consequences. Furthermore,

> For mentally ill defendants, restoration usually entails a relatively brief period of roughly six months of psychiatric hospitalization to stabilize and medicate the defendant so as to eliminate or reduce psychotic symptoms such as paranoia, thought disorder, loose associations, and delusions or hallucinations. For defendants with mental retardation, low educational levels, poor fluency in English, or few years in the United States, restoration to competency (or, more accurately, development of competency) may require outpatient psychoeducation that teaches defendants about the legal proceedings and any social or communication skills necessary to work with their attorney and comport themselves appropriately in court.

This regimen is effective with most defendants, who generally are restored to competence in a few months and returned to court.[126] Incompetent defendants cannot be held indefinitely; in *Jackson v. Indiana*,[127] the Supreme Court held that indeterminate long-term commitment violates constitutional due process.[128] In response to *Jackson*, many states provide for a statutory restoration period of a year or less after which charges must be dropped and the defendant released.[129]

This framework may be ill-suited to immature youths who have never attained competence. Although some youths may become competent with instruction about the trial process, their attorney's role and other matters necessary for adequate participation, many will simply need time to mature. Immaturity-based incompetence that relates to rational understanding and decisionmaking capacity often can be remedied only through the process of psychological development. If this period of maturing extends into the future for a year or more, it becomes problematic on due process grounds under *Jackson*. Although child advocates might be satisfied with dismissal of the charges against immature youths who cannot be made competent with instruction, this solution is unlikely to be acceptable to those whose primary concern is public protection.[130] Moreover, many observers believe that accountability for criminal conduct is an

Redding & Frost, *supra* note 7, at 367.

126. *See* Bonnie & Grisso, *supra* note 18, at 78–79 ("In the vast majority of such cases, the defendant is returned to the court for trial within six months.").

127. 406 U.S. 715 (1972).

128. In *Jackson*, the defendant was mentally impaired, deaf, and mute. *Id.* at 717. He was found to be incompetent to stand trial and the trial court ruled that he be committed until he was certified sane. *Id.* at 719. Justice Blackmun, writing for a unanimous Court, noted that Jackson had been confined for three and one-half years and was unlikely to "ever be able to participate fully in a trial." *Id.* at 738–39. The Court held that due process requires a person "committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." *Id.* at 738.

129. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4510 (West 2004) (six months); FLA. STAT. ANN. § 916.13 (West 2001) (six months); GA. CODE ANN. § 17-7-130 (2004) (nine months); IND. CODE ANN. § 35-36-3-3 (West 1998) (six months). Some states have no statutory limitation. *See, e.g.*, VA. CODE ANN. §§ 19.2-169.2 to 169.3, 37.1-67.3 (Michie 2004) (providing for reassessments every six months). Some defendants who cannot be restored to competence may be eligible for civil commitment under standards that focus on the whether the individual is mentally ill and an imminent danger to himself or others. *Id.* § 19.2-169.3.

130. Punitive policies receive support, according to one such advocate, because "those detained will be less likely to re-offend. Furthermore, those who cannot be rehabilitated . . . will then be incarcerated so that they are not back out on the streets." Chamberlin, *supra* note 3, at 410.

important component in the rehabilitation of young criminals; on this view, dismissal of charges harms young offenders as well as society.[131]

Because of the distinctive features of developmental incompetence, adoption of the minimalist approach may impose an unacceptable burden on courts and on society that ultimately may result in a weakening of the due process rights of youths. Predictably, under this approach, both criminal and (particularly) juvenile courts are likely to be flooded with petitions for competence evaluations and large numbers of youths could be found incompetent, with no satisfactory disposition available for many of them. Under these circumstances, this constitutional requirement is likely to be given lip service without providing any substantial protection for immature youths. The upshot is that a minimalist approach that simply recognizes this form of incapacity without making other doctrinal and structural adjustments is likely to be inadequate.

B. The Case for Dual Competence Standards

1. Why Dual Standards Are Necessary

The unique features of developmental incompetence create a dilemma for courts unless appropriate mechanisms are available for responding to youths who are incompetent to proceed under the conventional legal standard. To be sure, some youths may be found incompetent simply because they lack adequate understanding about the purposes and operation of a criminal trial.[132] They may respond to focused "competence training" programs designed to provide instruction that will enable them to function in their assigned role with at least minimal effectiveness. The question is how to respond to youths whose developmental incapacity is not correctable with short-term remedial instruction.

It is critically important to find a satisfactory answer to this question. Consider the dilemma faced by a criminal court judge deliberating about the competence of a thirteen-year-old charged with aggravated assault and armed robbery. The charges arose from an incident in which the youth and his friends allegedly ran off with

131. *See* FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 89–96 (1982).

132. Although lack of information and experience per se is not a sufficient basis for competence, some youths, because of worldly inexperience, may lack a basic comprehension of what the proceeding is about and what are the functions of the various participants. An intensive program that instructs them on these matters may be sufficient to create competence.

an elderly woman's purse after attacking her brutally with a tire iron, causing her to suffer serious injuries. The youth, because of his extreme immaturity and low IQ, fails to comprehend the seriousness of the charges or the consequences of conviction. He can provide little assistance to his attorney, and it seems highly unlikely that these deficits can be remedied in the near future. If the court decides, as it should, that the youth is incompetent, neither dismissal of the charges nor long-term indefinite confinement ("waiting for maturity") will be acceptable dispositions; the former sacrifices public safety and accountability, and the latter violates constitutional norms.

In our view, the disposition that is appropriate for this youth and for most developmentally incompetent youths is adjudication in a juvenile delinquency proceeding. If a juvenile court adjudicates the charges against the youth, it can determine whether he committed the crime and, if so, it can structure a disposition based on remediation, accountability, and public safety. This outcome is possible only if criminal and juvenile courts apply dual standards of competence, such that a youth who is found incompetent in a criminal proceeding can be adjudicated under more relaxed criteria in juvenile court. Such a regime largely resolves the dispositional quandary faced by courts dealing with immature youths charged with serious crimes. On the other hand, if a uniform standard is applied in both judicial contexts, the youth excluded from criminal court on grounds of incompetence would also be unable to participate in delinquency proceedings.

The application of dual competence standards in criminal and delinquency proceedings is important for another reason; it is the means to avoid profound disruption of juvenile delinquency proceedings. Although few thirteen-year-olds are subject to criminal charges, many face adjudication in juvenile court. The research evidence suggests that evenhanded application of adult competence criteria may well result in the disqualification of a substantial percentage of youngsters from adjudication in *any* court. This outcome is jarring in light of uncontroversial premises of juvenile court jurisdiction; few would challenge the appropriateness of delinquency proceedings for younger teens. Thus, as a policy matter, a strong case can be made for a relaxed juvenile court competence standard under which immature youths could be tried in delinquency proceedings, even though they are incompetent to stand trial under adult criteria.

2. Dual Standards Under the Due Process Clause

The critical question then becomes whether less demanding competence criteria in juvenile court satisfy the mandates of due process. As we have indicated, some post-*Gault* courts have assumed that the adult competence standard must be applied in delinquency proceedings. Other courts effectively have adopted dual standards, suggesting that the juvenile court standard is based on "juvenile norms" and emphasizing that a finding of incompetence in a criminal proceeding would not necessarily bar delinquency adjudication.[133] These courts assume, rather than conclude on the basis of analysis, that dual standards violate no constitutional norm. Thus, their observations, at most, simply reflect an intuition that delinquency and criminal proceedings differ in their clientele, purposes and consequences, and that a relaxed competence standard in juvenile court is acceptable because of these differences. However, because the central feature of the legal framework that we endorse is a regime of dual standards, and because that feature is likely to be somewhat controversial, it is important to demonstrate that this approach satisfies due process.[134]

The principle of fundamental fairness is the broad constitutional standard under which courts evaluate procedural challenges in both criminal and delinquency proceedings. The Supreme Court has made clear, however, that due process does not require that the constitutional protections afforded youths in juvenile court replicate those offered defendants in criminal trials. Emphasizing the unique features of juvenile proceedings, the Court has found that some important safeguards, such as the rights to a jury trial and to bail, would undermine the purposes of the juvenile justice system and are not essential to fair process in this setting.[135]

The question that we address is not whether delinquency proceedings are subject to the competence requirement at all—we

133. *See* Golden v. State, 21 S.W.3d 801, 803 (Ark. 2000); People v. Carey, 615 N.W.2d 742, 748 (Mich. Ct. App. 2000).

134. Some courts insist that the adult standard be applied in delinquency proceedings (although without analyzing the implications of doing so). *See, e.g.*, *In re* W.A.F., 573 A.2d 1264, 1267 (D.C. 1990) ("Accordingly, we hold that the determination of mental competency of a juvenile is one of those instances where the procedure followed in adult criminal prosecutions *must* be applied to juvenile delinquency proceedings.") (emphasis added).

135. In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court emphasized the detrimental impact of a jury trial on delinquency proceedings, in light of the purposes of the juvenile court, stating that "[i]f the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into the system the traditional delay, the formality and the clamor of the adversary system." *Id.* at 550; *see also* Schall v. Martin, 467 U.S. 253, 281 (1984) (holding that juveniles can be held in pretrial detention without a bail hearing).

take that to be settled—but whether the application of a relaxed standard in this setting (requiring less competence than is required in a criminal proceeding) can satisfy the demands of due process. As a purely conceptual matter, the adoption of dual standards is quite feasible because competence, unlike many procedural protections is largely a continuous rather than binary construct. Typically, the inquiry about incorporation of constitutional safeguards is posed as a categorical choice between extending or not extending a particular protection to delinquency proceedings. However, the legal boundary between competence and incompetence is located along a continuum by legal authorities on the basis of a mix of policy concerns. Thus, in theory, lawmakers could require a higher level of competence than *Dusky* mandates—the capacity to independently make all key trial decisions, for example.[136] That the standard is not so demanding reflects an implicit balancing of defendants' rights and interests against the public interest in bringing criminals to justice. The upshot for our purposes is that the competence thresholds for delinquency and criminal proceedings *can* be fixed at different locations on the basis different policy demands.

This, of course, does not resolve the question of whether dual standards satisfy the mandate of due process. The Supreme Court has emphasized that the Constitution does not require the wholesale incorporation of adult procedural rights into delinquency proceedings, but has offered no test to guide the determination of whether a contested procedural protection is required by fundamental fairness. However, several themes that can be extracted from the Court's examination of due process claims in this context inform our analysis. First, the Court has emphasized that a procedural safeguard that is likely to be "disruptive of the unique nature of the juvenile process"[137] and to dilute its beneficial aspects may not be required in juvenile court.[138] For reasons that we have discussed, this consideration is highly salient in evaluating the impact of a uniform competence standard. However, this deference rests on the assumption that a juvenile delinquency proceeding is different from a criminal trial in ways that serve the interests of youths facing

136. *See* Godinez v. Moran, 509 U.S. 389, 402 (1993) (declining to hold that an independent determination of defendants' competence to make specific decisions—waiving right to counsel and enter a guilty plea—is mandated by due process).

137. *McKiever*, 403 U.S. at 540.

138. *Id.* at 550 (faulting the jury trial for bringing "delay, the formality, and the clamor of the adversary system and, possibly, the public trial" which ignores "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates").

charges in juvenile court.[139] This qualifying condition is important to our analysis, leading us to conclude that, regardless of its disruptive impact, a relaxed juvenile court competence standard is constitutionally sufficient only if delinquency proceedings promote the welfare of youths who do not meet the adult standard.[140] Finally, the Court has focused on whether a contested procedural safeguard is important for accurate factfinding in the adjudication of criminal charges.[141] We extend this concern to examine whether a relaxed juvenile court competence standard adequately satisfies the purposes of the competence requirement as applied in this setting.

As to the first consideration about the disruptiveness of the proposed procedure, the earlier discussion makes clear that serious disruption of delinquency proceedings is likely to follow if a uniform competence standard is applied in criminal and juvenile courts and that this can be avoided by adopting a relaxed standard. First,

139. In holding that juveniles do not have a right to a jury trial in delinquency proceedings, the *McKiever* Court emphasized the rehabilitative purposes of the juvenile court and expressed a reluctance to give up on those purposes. *See supra* notes 137–38. Under the Court's general approach to due process, the type and extent of procedural protection required depends on contingencies of the legal setting. In the context of civil proceedings, the Court has emphasized the flexibility of the constitutional norm, which " 'calls for such procedural protections as the particular situation demands.' " Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

140. As we argue *infra* Part III.D, these conditions could be the basis of institutional reform of juvenile dispositions in general or they could be applied only to youths who fail to meet the adult standard.

141. In general, due process analysis focuses on whether particular procedures are necessary to avoid error. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court formulated a test for evaluating due process claims in civil proceedings. The *Mathews* formula requires consideration of three factors—the private interest affected by the official action; the risk of an erroneous deprivation through the procedures used and the value of additional procedural safeguards; and the government's interest, including fiscal and administrative burdens that the additional requirement would entail. *Id.* at 334–35.

It is unclear whether the *Mathews* test applies to criminal proceedings, and we have not based our analysis on its criteria. The Supreme Court has applied it to challenged procedures in criminal proceedings occasionally, *see, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (determining whether an indigent defendant should be provided a psychiatrist), and has described it as a "a general approach for testing challenged state procedures under a due process claim." Parham v. J.R., 442 U.S. 584, 599 (1979). However, in *Medina v. California*, 505 U.S. 437 (1992), the Court, while upholding a state procedural rule putting the burden of proving competence on the defendant, declined to apply the *Mathews* framework to the claim, suggesting that it was not applicable to criminal proceedings. *Id.* at 443. Instead, the Court insisted that the due process standard in criminal proceedings is fundamental fairness. *Id.* at 445. *Mathews* has been applied to many non-criminal procedures in which the deprivation of individual liberty is at stake. *See, e.g.*, *Parham*, 442 U.S. at 599–600 (involving voluntarily committed children in a state mental hospital); Addington v. Texas, 441 U.S. 418, 425 (1979) (involving civil commitment procedures).

juvenile courts that apply the adult standard are likely to be burdened with a flood of petitions for competence evaluations and hearings, resulting in a major diversion of financial and human resources to a process that most would agree should have limited importance in this legal setting. Also, if many younger defendants are found incompetent under the adult standard, government efforts to protect the public from youth crime, to hold young offenders accountable, and to provide them with rehabilitative services will be undermined. As we have argued, a doctrinal regime under which many younger teens—particularly those charged with serious crimes—might be immune from prosecution probably would be rejected as unacceptable, and ultimately, would undermine the legitimacy of the juvenile court. Under a tailored juvenile court standard, this procedural safeguard can function to exclude only those youths whose extreme immaturity makes even juvenile court adjudication inappropriate.

Although the potentially disruptive impact of a uniform competence standard seems clear, the constitutional adequacy of a dual-standards regime also depends on whether delinquency proceedings differ substantially from criminal proceedings, such that the more protective adult standard is not mandated in this setting. The interest of adult defendants facing criminal punishment justifies the existing competence requirement and serves as a baseline for evaluating the interests of juveniles in delinquency proceedings. In other cases dealing with procedures resulting in deprivations of liberty, the Court has made clear that the state's purposes in restricting liberty and the impact on affected individuals are key to evaluating the mandates of due process. For example, where the state's purpose in confining an individual is to provide treatment for mental illness, the procedural requirements of criminal proceedings can be relaxed.[142]

A relaxed competence standard will meet this second condition

142. *Addington v. Texas*, 441 U.S. 418 (1979), found that involuntary civil commitment can be ordered upon proof by clear and convincing evidence; because the state's purpose is not punitive and because of added safeguards such as professional observation and family concern, proof beyond a reasonable doubt is not required. *Id.* at 428. However, an intermediate standard of proof was required because of the individual's interest in avoiding the deprivation of liberty, based on an erroneous decision; thus, the preponderance of the evidence standard was found to be inadequate. *Id.* at 426–27; *see also Parham*, 442 U.S. at 599–609 (holding that youths whose parents seek to admit them to psychiatric facilities have a liberty interest in avoiding erroneous placement, but that an adversary proceeding is unnecessary to protect that interest because of the treatment purpose of the placement and because of the parents' authority to decide what is best for the child).

of "distinctiveness" if delinquency proceedings are different from criminal trials in two important dimensions. The first concerns the severity of punishment and its impact on the future lives of young offenders. Juvenile court sanctions, especially for serious crimes, must be of shorter duration than those imposed on adult criminals. Moreover, dispositions should be completed within a self-contained juvenile correctional system, such that they do not extend into adulthood or affect adult status or opportunities.[143] The traditional juvenile justice system was characterized by dispositions more lenient than the adult system, and contemporary regimes can be evaluated along this dimension as well.[144] If the dispositional differences are insufficient in this regard, the adult standard must be applied.

The distinctiveness condition also requires that the purposes of delinquency proceedings must be broader than those of criminal proceedings and must include consideration of the welfare of young offenders. Today, to be sure, criminal and delinquency proceedings both aim to punish offenders, deter crime and protect public safety through the incapacitation of dangerous persons. However, the juvenile system, traditionally at least, also has been committed to treatment and to offering dispositions that enhance the likelihood that delinquent youths will become productive adults. This distinction from the adult justice system is important in the justification of a relaxed competence standard in delinquency proceedings.

The upshot of our analysis is that whether a juvenile court adjudication is sufficiently different from a criminal trial to justify relaxing the constitutionally required competence standard depends in part on institutional features defining the juvenile justice system and its purposes. If youths facing adjudication in juvenile court are subject to dispositions that are more lenient than criminal punishment and that are aimed (in part) at promoting youth welfare, then the stakes they face are lower than (and different from) those facing criminal defendants and the need for adult procedural safeguards to protect their interests is less compelling. Under these conditions, a relaxed standard in delinquency proceedings may be justified, given the disruptive impact on delinquency proceedings of applying a

143. In a "self-contained" system, no record follows the offender into adulthood, as a basis for enhanced sentencing as an adult. This means, of course, that the conviction should not be counted under three-strikes laws.

144. Certainly, this aptly described the traditional juvenile correctional system. If under the recent punitive reforms, youths face adult jeopardy, their interests may be indistinguishable from those of adults. *See infra* Part III.D.

uniform standard. On the other hand, if juvenile proceedings and criminal trials are alike in their consequences and purposes, then accused youths should receive the same protections as criminal defendants.

Assuming the institutional preconditions are met (for now), a relaxed standard will meet the mandate of fundamental fairness only if it also satisfies the underlying purposes of the criminal competence requirement—the promotion of dignity, accuracy, and defendant participation. Under the competence criteria that we endorse, a youth facing a delinquency proceeding must have a basic understanding of the charges and proceeding and of her position as defendant in that proceeding, and the capacity to communicate with her attorney.[145] This standard accommodates the developmental incapacities that might leave many youths incompetent to be tried as adults, while at the same time requiring basic comprehension of the delinquency proceeding, its meaning, and consequences.

To elaborate a bit on the operation of a relaxed standard, a youth faced with a serious delinquency charge must understand why he faces a deprivation of liberty and the possible extent of that confinement. But, because the consequences are less far-reaching than those of a criminal proceeding, a lesser ability to foresee remote consequences would be sufficient. The youth must also understand that his attorney's role is to advocate for him, that the prosecutor aims to convict and punish him, and that the judge will decide whether he committed the crime based on the evidence. But he need not understand how advocacy is translated into practice in a way that would be required of an adult. He must also have the capacity to provide his attorney with an account of relevant events and to answer questions so that the attorney can plan and execute a defense. But he need not have the ability to weigh the value of defense strategies, or to advise counsel accordingly. In delinquency proceedings, attorneys will often have an additional burden of explanation and solicitation of assent in planning a defense. It seems likely, however, that in practice, attorneys already play this role with younger clients, whose questionable competence heretofore has not been expressly acknowledged.

This standard satisfies the purposes of the competence requirement sufficiently to protect the interests of youths in delinquency proceedings—assuming the pre-conditions are met. The

145. This standard was proposed by Bonnie and Grisso. *See* Bonnie & Grisso, *supra* note 18, at 76.

dignity and integrity of the proceedings are preserved if youths are not confused about the jeopardy they face or bewildered at the purpose and nature of the proceedings. Accuracy is satisfied if a young client can describe relevant events to her attorney; this communicative role also satisfies the purpose of promoting participation by the youthful client. What may also be important in realizing these purposes is the development of a set of guidelines and practices by which young defendants' understanding and effective participation in delinquency proceedings can be enhanced. Such guidelines might include the creation of a process that provides adequate time for attorney-client consultation and the development of strategies for explaining trial-related concepts grounded in educational principles and developmental knowledge. If these goals are taken seriously, most youths should be capable of participating in delinquency proceedings with sufficient competence to satisfy due process.

C. *Dispositions of Incompetent Youths in Delinquency Proceedings*

Even under a relaxed standard, of course, some small number of youths will not be competent to be adjudicated in a delinquency proceeding. In this section, we examine the responses available to juvenile courts for the disposition of these youths. At the outset, note that some portion of youths found incompetent by juvenile court judges can acquire the requisite understanding through age-appropriate instruction. Thus, a variation of the "competence training" described earlier may be usefully deployed in delinquency proceedings as well as criminal trials. However, immature youths who do not respond sufficiently to instruction or cannot learn to communicate with their attorneys in a reasonable time period cannot be adjudicated. On a far more limited scale, we face again the challenge that we described earlier in the context of criminal proceedings, except that the simple solution of adjudicating incompetent youths in a different venue is unavailable here.

Although no dispositional response will deal with every youth in this category, several options are available that together will resolve most cases adequately. Mental health and social service dispositions may be appropriate for most of these youths. For some young delinquents, mental illness may be a contributory factor to incompetence or to the delinquent conduct; these youths may be subject to mental health interventions including admission to

inpatient facilities.[146] Other youths may be involved in criminal activity due to inadequate supervision and control by their parents. In these situations, intervention by social service agencies may be appropriate, to provide parents and their delinquent children with services to correct problems that have contributed to the child's delinquent behavior. If parents cannot provide adequate care and oversight, removal of the child from the family and placement in foster care sometimes may be necessary. Finally, in the rare case, dismissal of the charges with no other action will be the appropriate response.

In a regime of dual standards, very few youths will be in the category of defendants who cannot be adjudicated in juvenile proceedings due to their incompetence. Of this small group, some may attain competence in a reasonable period through training, and most of the rest will be subject to dispositions that assure that they receive adequate supervision and useful remedial services. Thus, dealing with this group creates little threat of systemic crisis, in sharp contrast to the potential disruption of both juvenile and criminal proceedings that is likely to occur under a uniform standard.

D. Juvenile Dispositions Under a Constitutionally Adequate Regime

We have argued that dual standards will satisfy the demands of due process if dispositions in delinquency proceedings are less punitive than criminal sentences and have broader purposes that include promotion of the welfare of young offenders. In this section, we examine the institutional implications for the juvenile justice system of these conditions. Legal authorities can satisfy these conditions through institutional changes that range from broad reform of juvenile dispositions to more limited accommodations that are tailored to apply only to those youths of questionable competence. A narrow approach presents a more modest political challenge, but the administrative complexities will be substantial.

Lawmakers responding to the constitutional challenge we have raised face a dilemma created by the recent trend toward harsher juvenile justice sanctions. Under the recent reforms, the boundary between the juvenile and adult systems has eroded in several ways. In many states, juvenile court dispositions can extend into adulthood

146. "Even after excluding conduct disorder, nearly 60% of male juvenile detainees and more than two-thirds of females met diagnostic criteria and had diagnosis-specific impairment for one or more psychiatric disorders." Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1137 (2002).

and delinquency adjudication can have far reaching consequences on the adult lives of young offenders. These features of the modern juvenile justice system undermine the justification for relaxed procedural safeguards in delinquency proceedings. At a minimum, youths who do not meet adult competence standards cannot be subject to sanctions that approximate adult punishment or carry consequences into adulthood.[147] To justify a relaxed competence standard, the juvenile court dispositions imposed on these youths should also be briefer in duration than adult sentences. For serious felonies that carry long criminal sentences, shorter dispositions would usually result if juvenile court age boundaries are set close to the traditional lines.[148] However, since immature youths are likely to be younger teens, even dispositions within these boundaries could approximate adult sentences in duration. If so, the jeopardy facing youths in delinquency proceedings would be similar to that of adult defendants, and the justification for a relaxed competence standard would not hold.

Shorter sentences and more limited consequences of juvenile dispositions are important, but these conditions alone may be insufficient to support applying a relaxed competence standard to immature youths in delinquency proceedings.[149] Beyond differences in the amount of punishment, a relaxed standard is more readily justified if these immature youths are offered correctional programs that are tailored to the needs of young offenders and are clearly different from those available in adult prisons. As we have mentioned, due process analysis frequently focuses on the government purpose in restricting liberty when procedures are challenged for insufficient rigor.[150] In the juvenile justice setting, a key purpose of programs should be to prepare immature youths for productive, non-criminal adult lives and not simply to punish and incapacitate them as lawbreakers. A programmatic focus emphasizing education, job training and the acquisition of life skills,

147. See *supra* notes 46–47 and accompanying text. This would include blended sentencing, the use of juvenile records in adult sentencing, including three strikes laws, and sex offender registration. It would also argue for closed delinquency hearings. Of course, the text statement does not apply to youths who can be made competent in a reasonable time. This might often be the case with mentally ill youths, but is less likely with developmental incompetence.

148. Thus, a fourteen-year-old armed robber will be released from a juvenile correctional facility by age eighteen or twenty-one, under the traditional jurisdictional boundary for dispositions, while an adult armed robber can receive a longer sentence.

149. If this were sufficient, one might expect to see a sliding competence scale on the basis of sentence duration in criminal proceedings.

150. *See supra* note 128.

together with substantial investment in clinical and family support networks to facilitate the transition to life outside of the correctional system, define the distinctive purposes of the juvenile system in ways that support a relaxed competence standard.[151]

Despite the punitive tilt of juvenile justice policy recently, many states have embraced these objectives. Pennsylvania, for example, has adopted an approach based on "balanced attention" to accountability, public protection and "the development of competencies to enable children to become responsible and productive members of the community."[152] That state's Juvenile Act describes goals of committing resources to skill assessment and development in young offenders and responding to their individual needs, and of providing opportunities for competence development. This approach, which has been adopted by other jurisdictions as well,[153] contrasts sharply with the conventional purposes of criminal punishment and signals that the purposes of a delinquency proceeding are broader than those of a criminal trial. It also demonstrates that a goal of investing in young offenders as future citizens can be accommodated within a justice policy that emphasizes individual accountability and public protection.

The conditions that we have described—more lenient dispositions that do not extend into adulthood either in duration or consequences, and distinct programmatic goals—are essential to the constitutional sufficiency of a relaxed competence standard in juvenile delinquency proceedings. In executing the constitutional mandate, some jurisdictions may opt for a "limited" approach, insulating from punitive sanctions and regulations only those youths who fail to meet adult competence standards, who also will be offered educational and therapeutic programs to promote their welfare.[154] Other states may undertake more comprehensive reform of their juvenile justice systems. How the conditions are implemented will depend in part on other policy goals.

Those who favor the recent reforms and believe that the legitimacy of the juvenile court depends on cracking down on serious juvenile offenders may opt for the limited approach. This response

151. *See* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 588 n.166–67 (2000).

152. 42 PA. CONS. STAT. § 6301(b)(2) (2004).

153. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 3-802(a)(2) (2003) (providing "for a program of services and treatment consistent with the child's best interests and the promotion of the public interest").

154. As we have indicated, no constitutional bar restricts juvenile courts from imposing punitive sanctions on older youths or others who satisfy adult standards of competence.

will require the adoption of juvenile court policies and procedures that distinguish between youths who meet adult competence standards from those who do not. Youths facing dispositions with adult-like consequences must meet the adult standard of competence, while such dispositions cannot be imposed on immature youths who are not competent under the adult standard (and will not attain competence in a reasonable time).[155] The upshot is that the juvenile justice system would become a two-tier institution in which dual competence standards are applied (within the juvenile court itself) and youths are assigned to different dispositional regimes in part on the basis of their developmental competence. A consequence of adopting this approach is that juvenile court competence hearings would become commonplace, resulting in considerable administrative costs.[156] Those who wish to retain the punitive reforms face a tough choice; either create a costly two-tiered system of competence within the juvenile court itself or adopt a uniform standard under which immature youthful offenders who do not meet the adult trial competence standard cannot be adjudicated at all.

An alternative approach is to undertake broader reforms of the juvenile system. The dilemma that we have described will not in itself lead lawmakers to revise punitive policies or undertake major changes that alter the character of the modern juvenile system—and such comprehensive juvenile justice reform would likely face substantial political obstacles.[157] However, as trial competence gains attention in policy discourse, those who have reservations about the recent punitive trend may well conclude that this challenge provides the opportunity to re-evaluate the wisdom of punitive policies and to reassess the purposes and programs of the juvenile justice system.

E. Reevaluating the Boundary of Juvenile Justice

Incorporating developmental competence into criminal justice policy may result in the reevaluation of another dimension of the

155. Thus, if a youth charged with a serious offense (to which a punitive sanction ordinarily would attach) is found to be incompetent under the adult standard, she could be tried under the relaxed standard and subject to less severe dispositions that conform to our conditions.

156. These costs include not only judicial proceedings, but also forensic evaluations, attorney preparation and delay. Delayed judicial proceedings undermine the efficiency of juvenile court administration and also may dilute the sense of accountability experienced by young offenders when their crimes and sanctions are separated by a long time period.

157. A simpler response would be to undertake comprehensive reforms but also to retain punitive sanctions for a small category of youths charged with serious crimes. These youths would have to meet adult competence standards.

recent punitive trend—the expansion of the pool of juveniles potentially subject to criminal court jurisdiction.[158] Whether introducing developmental competence into criminal proceedings creates a substantial burden on the administration of justice in that setting will depend in large part on how commonly younger teens are tried as adults. This in turn depends, of course, on background legislative policy, as well as on the inclinations of prosecutors regarding the appropriate forum for adjudicating minors.

As the salience of this issue becomes clear, the costs of evaluating and determining the developmental competence of younger juveniles who are eligible for waiver to criminal court may influence the legislative judgment about the age boundary between juvenile and criminal courts. This is not to say that the minimum age of criminal adjudication or the range of crimes for which juveniles can be prosecuted as adults will or should be determined solely on the basis of research-based predictions about trial competence. Many states may conclude that the costs of competence determinations are justified as a means to assure that youths charged with serious crimes can be tried as adults. Moreover, in most states today, not many younger teens are charged as adults. However, some legislatures may conclude that excluding younger juveniles from criminal court is an efficient means of limiting the cost of procedural protections that would be invoked categorically by all members of this class of defendants.[159] This consideration would support adjusting the minimum age boundary for criminal adjudication to a point nearer to its traditional location, such that most youths tried as adults could be expected to satisfy trial competence requirements.[160]

CONCLUSION

Many legal reforms have unintended consequences that create costs and challenges not contemplated by lawmakers. The recent legal trend toward criminal prosecution and punishment of juveniles has unintentionally created a challenge of constitutional proportions. It is clear under conventional constitutional doctrine that youths who are incompetent to stand trial due to immaturity under the prevailing

158. *See supra* notes 42–50 and accompanying text.

159. The costs include the funds spent on evaluations and hearings for all participants, the costs of dispositions for incompetent youths, and the systemic and personal costs of delay.

160. The research found few differences between adults and youths age sixteen and older. Under many traditional statutes, age sixteen was the minimum age of adult adjudication. *See supra* note 47.

legal standard cannot be tried as adults or subject to adult-like sentences in juvenile court. We have suggested that the adoption of dual competence standards in criminal and juvenile court can satisfy due process and goes a long way toward resolving the problem faced by lawmakers—but only if juvenile court dispositions meet certain conditions. Our analysis demonstrates that an innocuous procedural protection relevant to a small group of adult defendants becomes far more important when applied to immature youths. Both doctrinal and institutional changes of some magnitude will be necessary to bring criminal and juvenile delinquency proceedings into compliance with the mandate of constitutional due process.